

REPORTS OF CASES
PRINCIPALLY ON
PRACTICE AND PLEADING,
AND RELATING TO THE
OFFICE OF MAGISTRATES,

DETERMINED IN
The Court of King's Bench.
ALSO,
REPORTS OF CASES TEMP. LORD MANSFIELD,
IN THE YEARS 1782, &c.,

FROM
THE MSS. OF MR. JUSTICE ASHURST;
With Notes.

By JOSEPH CHITTY, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

VOL. II

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CASES

PRINCIPALLY

ON

PRACTICE AND PLEADING

AND RELATING TO THE

OFFICE OF MAGISTRATES,

DETERMINED

IN

The Court of King's Bench.

ABATEMENT.

ANSELL *against* WATERHOUSE.

1817.

Trinity T.

DECLARATION in case against defendant, as “the proprietor of a common stage-coach for the carriage of passengers for hire from, &c. to &c. and that the defendant had and received into his coach plaintiff’s wife, to be safely carried as such passenger for hire; and that the defendant, not regarding his duty, did not take due care, &c. and by reason thereof the carriage was overturned, and the plaintiff’s wife hurt.” The defendant pleaded in abatement nearly in the same form as in 2 New Rep. 366, of the non joinder of other coach owners, to which plea there was a demurrer and joinder.

In an action on the case against a common carrier, for not safely carrying a passenger, defendant cannot plead in abatement the nonjoinder of a co-proprietor.

Richardson in support of the demurrer, after observing on the inconvenience resulting from allowing pleas in abatement in actions of this nature, where the plaintiff

1817.
 ANSELL
 against
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must in general be ignorant of the number of proprietors, and might be defeated on such a plea in several successive actions, cited *Govett v. Radnidge*, 3 East, 70. and *Dixon v. Clifton*, 2 Wils. 319.

LORD ELLENBOROUGH C. J. In this case I see in the declaration no word of contract.

It has been expressly avoided by the pleader, and the declaration states that the defendant was a common carrier, which made him liable at common law. Mr. Justice *Wilmot* says he is defendant, *ex delicto*. *Govett v. Radnidge* is a strong case for plaintiff. In *Max v. Roberts*, 12 East, 89. 2 New Rep. 454. *Powell v. Layton*, 2 New. Rep. 365, the defendant was not stated to be a common carrier, and there were express words of contract, and a ship owner is not a common carrier: here he is a common carrier, and this attaches the duty of law. *Max v. Roberts* was also an action against a ship owner. The law casts no duty on ship owners; his duty arises out of his contract.

Chitty, contrà. The declaration is not framed on the custom of the realm, nor is it averred that defendant was a common carrier. If the declaration had been framed in assumpsit it is clear the defendant might have pleaded in abatement; and the plaintiff cannot, by changing the form of action, take away a ground of defence that would otherwise subsist. *Jennings v. Rundall*, 8 T. Rep. 335. He also relied on *Buddle v. Wilson*, 6 Term. Rep. 369; *Powell v. Layton*, 2 New Rep. 365, as resembling the present.

BAYLEY J. Those were cases of non-feazance, *Dale v. Hall*, 1 Wils. 281, as observed on in *Selwyn's Ni. Pri.* 5th ed. 412, 416; and *Max v. Roberts*, *id.* 412, 3, were also referred to.

Richardson. In *Jennings v. Rundall* there was no

duty, because the defendant was an infant. All the other cases were actions against owners of ships. The law is different as to carriers. *Dale v. Hall, Selwyn* N. P. 5th ed. 412, in all probability, was the first case in which this action was turned into assumpsit. What was said in *Powell v. Layton* must be taken with reference to that case where defendant was a ship owner.

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—
ANSELL
against
WATERHOUSE.

BAYLEY J. In all actions formerly against carriers, and that up till a very late time, it was usual to begin the declaration with an averment of the custom, and so in many other cases, as against innkeepers. The present is more than a mere non-feazance, for it is alleged that the coach was overturned through negligence. And as to the argument that the form of action should not alter the right, here was a *duty*, which distinguishes the case; and there are many cases in which the form of the action alters the rights of the parties. In trover it takes away the set-off. The advantage of a certificate is taken away from the defendant in trover for proceeds of a bill. *Parker v. Norton*, 6 Term R. 695. Declarations against carriers in tort, are as old as the law, and continued till *Dale v. Hall*, when the practice of declaring in assumpsit succeeded; but this practice does not supersede the other. Here there is no word of contract; there is nothing to shew that it was not a declaration on the custom of the realm. In substance, defendant is stated to be a common carrier. In *Powell v. Layton*, the case of a ship owner, there were express words of contract, and an exception as to perils of the sea. This was only declaring as usual 400 years before *Dale v. Hall*. There is a breach of duty on which as well as defendant's public character, the declaration is framed. This being an action for a tort, all its consequences follow, and the plaintiff might sue some only. The declaration charges carelessness and negligence, by

ANSELL
against
WATERHOUSE.

which the coach was overturned. The plea says, that all the parties were guilty of the carelessness and negligence. There was no such plea before *Buddle v. Wilson*, 6 T. R. 369, which was a case of non-feazance, and the court overruled the plea on another point. *Govett v. Radnidge* would be the case to follow, if necessary to decide between conflicting cases. The case of *Powell v. Layton*, and other cases against ship owners, are distinguishable.

ABBOTT J. This decision will not interfere with former authorities. A *duty* attaches on a common carrier. The declaration contains an accurate description of a common carrier. Plaintiff has his election, and may declare in either form, either for a tort, or in assumpsit on the expressed or implied contract.

HOLROYD J. was of the same opinion. This action is founded on what is quite collateral to the contract, if any ; and the terms of contract, unless charging the duty of a common carrier, are in this case quite immaterial. Declaration states obligation imposed upon him by the law. This is an action against a person, who, by ancient law, held as it were a public office, and was bound to the public. Innkeepers were liable to indictment for extortion by ancient law, as well as action to refund. This action is founded on the general obligation of the law, and *ex delicto* for acting against it.

Judgment for plaintiff.

Respondeat ouster.

1817.

ATKINSON v. ——— GENT. ONE, &c.

4th Feb. Hil. T

CURWOOD appeared in support of a demurrer to a plea in abatement, that defendant was privileged as an attorney. The ground of the demurrer was, that the defendant had waived his privilege; but the facts from which this was to be collected, not appearing precisely on the face of the pleadings, *Curwood* now applied for leave to withdraw the demurrer, and to be at liberty to reply, and put the fact in issue.

The Court will not permit a plea in abatement to be amended; but plaintiff will be allowed to withdraw a demurrer to such plea and reply (a).¹

On its being objected, that there could be no amendment in cases of pleas in abatement, and that therefore this course could not be pursued,

HOLROYD J. said, that it might be done; for it would not be amending the plea in abatement, but permitting the plaintiff to reply to the same.

Leave granted.

(a) Pleas in abatement are not, in general, allowed to be amended. *Tidd. Prac.* 7th ed. 662. *Cas. Pr. C.P.* 29. For instances where the plaintiff has been allowed to withdraw a demurrer, and reply to the plea. *Tidd.* 7th ed. 741. 8 T.R. 496. 6 T.R. 550, 1.

1820.

WADE against EDWARD BIRMINGHAM, ESQ.

12th February.

THIS was an action upon an *Irish* judgment, and the defendant pleaded in abatement, the privilege of peerage, by the title of *Baron Atheltry*, in the kingdom of *Ireland*; and upon this plea, issue being joined, notice of trial was given for the adjourned sittings after this present term.

Chitty on a former day moved to postpone the trial, until the sittings after next term, on an affidavit, which stated, that the defendant had come to his title since the judgment recovered against him in *Ireland*;

Where defendant pleads in abatement, he must be prepared to prove his plea promptly; and a strong case must be made out before the Court will postpone the trial, in order to enable the defendant to procure the evidence of witnesses.

1820.
 WADE
 against
 EDWARD BIR-
 MINGHAM, ESQ.

that it was necessary for him, in order to support the plea in abatement, to procure the attendance of several witnesses from *Ireland*, for the purpose of proving his title to the barony of *Athelry*; but those persons being in official situations in *Dublin*, it would be impossible for him to procure their attendance for the sittings after this Term; and that he was advised by counsel that he was entitled to his privilege, and that he was now in the course of proceeding to establish his claim to the title of Baron *Athelry*, by legal process.

Marryatt now shewed cause against the rule, and contended that the plea in abatement was obviously a dilatory plea, and consequently the defendant should be in a condition to support it with promptitude. The affidavit upon which the motion was made, did not swear, that the supposed witnesses necessary to support the defendant's title, would ever attend; neither did it appear that he had ever made any attempt, or had taken any steps, to procure their attendance.

ABBOTT C. J. The legislature, in order to prevent the delay which in former times was experienced by the pleading of pleas in abatement, has required every such plea to be filed within four days. Now it appears to me that the Court should follow up that wholesome provision, and require that the party shall be prepared to go to his trial at the very first time the case can come on to be tried; and that we should not allow him any further time to obtain his evidence; for by so doing, in every instance, instead of furthering, we should be defeating the object which the legislature had in view. The general rule in cases of pleas in abatement is, that the party shall be prepared to go to trial promptly. There may be exceptions to that rule, but this is not one.

BAYLEY J. Upon the merits of the case, the defendant is certainly entitled to no indulgence, because the issue is simply on the plea in abatement: but even supposing this were a case in which justice required that the trial should be postponed, the defendant's affidavit is insufficient.

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WADE
against
EDWARD BIR-
MINGHAM, ESQ.

HOLROYD J. concurred (*a*).

Rule discharged.

(*a*) *Best J.* was absent.

DOUGLAS against GREEN.

1820.

4th February.

HUTCHINSON moved to set aside the interlocutory judgment signed in this case, for irregularity, the alleged irregularity being, that there was a plea in abatement filed in the office with the usual affidavits, at the time the judgment was signed. The facts were these:—The defendant was arrested by a wrong christian name, upon a writ returnable the first return of this term. Defendant's attorney immediately informed the plaintiff's of the misnomer, and before declaration, filed a plea in abatement. Next day the plaintiff declared against the defendant by his right name, and the latter having neglected to plead *de novo* in time, the plaintiff signed judgment as for want of a plea; and the question was, whether the plaintiff's proceedings were regular.

The defendant being arrested by a wrong name, informed the plaintiff's attorney of the error; and afterwards, before the declaration was delivered, pleaded in abatement; next day, plaintiff declared in the defendant's right name, and the latter having omitted to plead *de novo*, the plaintiff signed judgment as for want of a plea; Held that the judgment was regularly signed (*a*).

PER CURIAM. The defendant has no right to plead until the plaintiff has declared. He is not to answer until he is called upon to do so. The plea

(*a*) A plea before defendant has appeared, or taken declaration out of office, is a nullity; *Tidd*, 7th ed. 583; but the affidavit in support of a plea in abatement may be sworn before declaration. 1 *East*, 348. 4 *M. & S.* 332.

1820.

DOUGLAS
against
GREEN.

pleaded is no plea at all, because in fact there was no declaration at the time to which he could plead. The defendant having pleaded irregularly, the plaintiff was not bound to take notice of it. The affidavit of the truth of the plea can be of no avail, because it was, in fact, no plea at the time. We are of opinion that the judgment has been regularly signed.

HOLROYD J. said, the course now is for the plaintiff on the return of the writ to file the declaration in the proper form, where there has been a misnomer in the writ; and it has been held, that the declaration so filed cures the objection to the writ. I remember applying to Mr. Justice *Dampier*, to set aside a declaration so filed, and I complained that it was irregular; but he made an order affirming the regularity of the proceeding. Application was afterwards made to set aside the order, but the Court supported it. After plea in abatement stating a misnomer in the declaration, the judge will amend the latter, by reference to the writ, if the name in the writ be right.

Rule refused.

1807.

Nov. 27.

WAKEFIELD *against* **MARDEN.**

Pleas in abatement cannot be filed before defendant has appeared, there being no distinction in this respect between pleas in abatement and pleas in bar, and therefore judgment may be signed for want of a plea, though plea in abatement has been filed, if defendant has not appeared (a).

ESPINASSE had obtained a rule, calling upon the plaintiff to show cause why the judgment signed in this cause for want of a plea, should not be set aside, on the ground that a plea in abatement had been previously filed.

Lawes, in showing cause against the rule, produced an affidavit, stating that it was true the plea was regularly pleaded, but the defendant had never appeared. The plaintiff, therefore, was justified in treating the plea as a nullity, and signing judgment.

(a) See last case.

Espinasse contra, urged that the plea was pleaded in person, and that it was unnecessary that an appearance should be entered.

1807.

WAKEFIELD
against
MARDEN.

SED PER CURIAM. There is no such distinction. The defendant must in all cases appear, and therefore the rule must be discharged.

Rule discharged.

ACCOUNT.

1818.

10th Feb.

SMITH *against* SMITH.

Two principal officers of the court appointed auditors, on motion, in an action of account (a).

ACTION of account. After judgment *quod computet* had been given for the plaintiff, *Denman* moved that auditors might be appointed, to take the account between the plaintiff and defendant.

ABBOTT J. said, the officer of the Court had handed him two precedents in his book, from which it appeared that in each of those cases the Court appointed the two principal officers of the Court: and accordingly he appointed Mr. *Le Blanc*, and Mr. *Chapman*, auditors.

(a) There are two judgments in the action of account; the first, a judgment to *account*, which is interlocutory; and the second, final. After the first judgment, auditors are appointed to take the account. In *Godfrey v. Saunders*, 3 Wils. 73, three prothonotaries of the Court of Common Pleas were appointed auditors, and the entry on the record was as follows:—"and thereupon the said *T. S.* freely offers himself to account with the said *T. G.* for the goods and merchandizes aforesaid; whereupon, by the consent of the said *T. G.* and *T. S.*, *W. M.* Esq., *L. J.* Esq., and *A. D.* Esq. prothonotaries of the said Court here, are by the said Court here assigned auditors to take and declare the said account between the said *T. G.* and *T. S.*" 3 Wils. 88—99. The action of account has of late years fallen into disuse, a bill in equity being now commonly resorted to; and assumpsit will lie for the balance of an account, however numerous the items, the action of account being only necessary where the plaintiff cannot give evidence of his right without an account being taken. 5 Taunt. 431. 1 Marsh. 115, S. C. Vide 2 Campb. 236. Bul. N. P. 147, 8.

ACTION.

KERR *against* DICK.

1820.

12th Feb.

IN this case the defendant had been arrested on a *bill of Middlesex*, and held to bail on an affidavit of debt, founded upon a bill of exchange accepted by the defendant, *but not due at the time of the arrest*, the affidavit suggesting that the defendant was about to leave *England*, and go to parts beyond the seas. On the 25th ult. *Chitty* obtained a rule to shew cause why the bail bond should not be delivered up to be cancelled for this irregularity; and on the 4th instant, *Littledale* having shewn cause against this rule without effect, the Court made it absolute, with costs. On a subsequent day *Chitty* obtained another rule to shew cause why the *bill of Middlesex* should not be set aside for the same irregularity; namely, that at the time of the arrest there was no debt due.

If action be prematurely brought before cause of action accrued, the Court will, on a summary application, set aside the proceeding, though such objection would afford no defence on the trial.

Littledale now shewed cause against the rule, and contended that the Court ought not to set aside the *bill of Middlesex*, for by doing so the plaintiff would be deprived of all defence to an action of trespass, should the defendant adopt such a proceeding. It might be true, that the arrest could not be strictly justified under the writ in this case, and that the Court (as had already been done) would order the bail bond to be delivered up to be cancelled; but they would not altogether set the *bill of Middlesex* aside, because, in point of fact, it had been regularly issued, although the cause of action had not accrued at the time it was sued out. The plaintiff had no objection to the defendant's bringing an action *on the case* for maliciously arresting and holding him to bail, because the merits of

1820.

KERR
 against
DICK.

the case would furnish him with a good defence ; but his object was to restrain him from bringing an action of *trespass*, to which the plaintiff could have no defence, if the *bill of Middlesex* should be set aside. It might be true that it was not a good writ to hold the defendant to bail, but the Court would reject the *ac etiam* clause as surplusage, and after that was done, it might be a good *bill of Middlesex*, in defence of an action of *trespass*. In the case of *Foster v. Bonner* (a) it was held, that if the plaintiff prove a trespass or injury before the bill filed, though after the *latitat* returned, it is sufficient ; for by the general rule and course of this Court, the bill is the commencement of the suit ; and the *latitat*, except where it is replied to a plea of the statute of limitations, or to avoid a tender, or where it is given in evidence to support a penal action in point of time, is considered but as *process* ; and in the case of *Best v. Wilding* (b) it was held, that if the plaintiff prove a cause of action before the bill is filed, though after the writ is sued out, it is sufficient, as well in the case of bailable as common writs.

Chitty in support of the rule was stopt by the Court.

ABBOTT C. J. I am of opinion that the rule prayed in this case must be made absolute. For the furtherance of justice the Court have said, that when a case comes to trial at *nisi prius*, the time of suing out the writ may be inquired into for the purpose of sustaining the action, but not for the purpose of defeating it ; because, if the defendant meant to defeat the action, on the ground that the cause of action did not arise until after the writ was sued out, he should have applied to the plaintiff to correct his error before he

(a) *Cowp.* 454. See also 4 *East*, 75. 7 T. R. 4.

(b) 7 T. R. 4. See also 4 *East*, 75.

proceeded further ; or to the Court in the first instance, to set aside the proceedings before the cause goes to trial. This was the doctrine laid down in *Best v. Wilding* ; for there it was said, that the defendant should not be at liberty to defeat the action by shewing that the writ was sued out before the cause of action arose. Now, it does not appear to me, that it follows by any means as a consequence from that decision, that when such an objection as this is made in the first instance on the suing out on bailable process, before the cause of action accrued, that the party who has been deprived of his personal liberty by means of such irregular proceedings, is to be precluded from resorting to that remedy which the law affords him. The Court cannot vacate part of the process, and say that as to the rest, it shall be valid, for the purpose of defending an action of trespass. It appears to me that we ought to set aside this writ entirely, and not merely discharge the defendant on the terms of filing common bail. We cannot suffer the writ to be amended by striking out the *ac etiam* clause ; the more regular course is to set it aside altogether. For my own part, I cannot concur in giving the sanction of the Court to the practice of suing out the writ before the cause of action arises, although in a late stage of the cause such an objection shall not be allowed to defeat the action.

BAYLEY J. I am of the same opinion. The defendant comes promptly here to avail himself of the objection, which he would not be allowed to do in a later stage of the proceedings. In the case of *Best v. Wilding*, if the bail, or the defendant, had applied promptly for relief, it would have been granted.

HOLROYD J. concurred. (a)

Rule absolute.

(a) *Best J.* had left the Court.

1820.

KERR
against
DICK.

AFFIDAVIT.

1815.

23rd Jan.

ATKINS *against* REYNOLDS.

There must be a distinct and separate stamp for each distinct affidavit, before the same can be used or read (a).

CURWOOD took an objection to an affidavit, and urged that it could not be read, as there were distinct and separate affidavits indorsed on another affidavit, and though not forming a joint affidavit, yet it only had one stamp; and this, he contended, was contrary to the intent of the statutes 48 *Geo.* 3. c. 149. sch. part 2. s. 3. 55 *Geo.* 3. c. 148. sch. part 2. s. 3. And the Court acceded to the objection.

(a) *Tidd*. 7th ed. 516. The Court will however permit one of the affidavits to stand without having a fresh stamp, the party striking out the others. 3 *Taunt.* 469.

1822.

Trinity Term.

DE WOOLF AND OTHERS, *against* — .

Though affidavits have been used, and a motion filed thereon, they may be again referred to in support of a fresh motion.

A RULE *nisi* had been obtained in *Easter* Term last, on the affidavits of *A. B.* and others, calling on an attorney to shew cause why he should not render an account of money received, and pay the same to *C. D.* which rule was discharged, on the ground that no sufficient authority from *C. D.* to make the application appeared on the face of the affidavits. *Roche* in this Term moved on behalf of other persons named in the affidavits, for a rule *nisi*, why the attorney should not render an account and pay the money into Court, on being indemnified, as the Master should direct. No fresh affidavits were filed. *Chitty* objected, that the former affidavits could not be read, the same having once been ineffectually used, and could not again be resorted to. But *per*

BAYLEY J. As the present application is on the behalf of one of the persons named in the affidavits, they may be resorted to, being on the files of the Court. The former application was made ineffectually in point of form, and the expence of fresh affidavits and stamps need not be incurred.

1822.

**DE WOOLF
AND OTHERS
against**

ANONYMOUS.

1814.

26th Nov.

ESPINASSE moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the affidavit to hold to bail was imperfect, the real residence of a clerk (the deponent) not being stated therein, though that of his employers was.

In an affidavit to hold to bail, the residence of a clerk may be described to be of the office in which he is employed.

BAYLEY J. Thought it sufficient, and that it had been so decided (a).

(a) 1 M. & S. 103. Tidd. 7 ed. 201.

EICKE against EVANS.

1820.

12th Feb.

IN this case the plaintiff held the defendant to bail for the sum of 1500*l*. The affidavit of debt stated, "that the defendant was justly and truly indebted to the plaintiff in the sum of 1500*l*. for money laid out and expended by this deponent for the said defendant, and upon the balance of accounts." It appeared that the parties had been partners, and had lately dissolved partnership.

Affidavit of debt, "That B. owes to A. so much money, laid out and expended, and upon the balance of accounts," is insufficient.

Chitty on a former day moved to set aside the affidavit of debt and arrest, and proceedings thereon, on the ground that the nature of the debt was not sufficiently stated in the affidavit. The balance of account, mentioned in the affidavit, might be partly made up of

1820.

EICKE
against
EVANS.

bonds, not recoverable at law, or other causes of action in which the plaintiff might have no chance of succeeding ; besides, it is not stated that the money was due on an account acknowledged or stated by defendant.

Curwood shewed cause against the rule, and submitted there was enough in the affidavit to hold the defendant to bail.

PER CURIAM. The objection is that there is too much. The plaintiff cannot say there is a cause of action, without specifying what the cause is. Here the plaintiff has alleged that the defendant owes him so much money, "laid out and expended, and upon the balance of accounts," without specifying how much is due upon the balance of accounts, or of what the balance consists, or whether the defendant settled the same.

Rule absolute.

1822.

Trinity Term.

STORIE *against* **BALL.**

Affidavit to hold to bail on an Irish judgment, must shew value of the Irish money.

THE defendant in this case was arrested and in custody, on an affidavit to hold him to bail on a judgment in an action of covenant recovered by default, and after an inquiry executed in the Court of King's Bench in *Ireland*. The affidavit stated, that the defendant "is justly and truly indebted unto this deponent in the sum of five thousand three hundred and six pounds one shilling *sterling*, upon and by virtue of a judgment obtained in his Majesty's Court of King's Bench at *Dublin*, in that part of *Great Britain* and *Ireland* called *Ireland*, for the said sum of three thousand three hundred and six pounds one shilling *sterling*, recovered by this deponent against the said *John William Ball*, in the said Court of

King's Bench in *Dublin* aforesaid, in Trinity Term last past. And this deponent further saith that no tender or offer hath been made to pay to him this deponent the said sum of money, or any part thereof, in any note or notes of the Governor and Company of the Bank of *England* expressed to be payable on demand. Sworn at *Guildhall, London*."

1822.

STORIE
against
BALL.

Nolan K. C. applied that defendant might be discharged on common bail, on the ground that such affidavit was defective. The affidavit having been sworn in this country, it must be taken that the deponent intended to swear that the defendant was indebted in a sum of money *sterling in England* (a); whereas the money recovered was *Irish* money, and of less value than the sum sworn to; and there was no averment of the value of such *Irish* money. Secondly, there was no negative of a tender in *Irish* bank notes, as there ought to have been, the debt having been recovered in *Ireland*.

Chitty *contrâ*. The affidavit states that the money due is sterling money, and that the said sum sterling was recovered in *Ireland*. The judgment might have been on a contract to pay in *English* sterling money, in which case the judgment would have been for the same money, and the defendant is not at liberty to shew the contrary by affidavit; consequently the several sums mentioned in the affidavit must be considered as *English* money; and as to the other objection, it is not necessary to negative in an affidavit made here to arrest a party in *England*, a tender of *Irish* bank notes, and if it were, the objection is not available, the defendant not having produced an affidavit that he did tender as required. 43 *Geo. 3. c. 18. s. 2*:

HOLROYD J. inclined against the last objection,

(a) *Kearney v. King*, 2 *Bar. & Ald.* 301. 1 *Chitty's Rep.* 28. 273.

1822.

STORIE
against
HALL.

but held the first fatal, because an affidavit should be certain, and the intendment was that the judgment in *Ireland* was to recover in *Irish* money.

1814.

ALLISON against ATKINS.

14th April.

Affidavit by an agent negating tender of cash notes sufficient, unless defendant swear to a tender (a).

CURWOOD moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the affidavit to hold to bail was defective, because it did not appear that the deponent was the attorney of the plaintiff or his clerk, or in any other manner connected with the plaintiff, and the affidavit negated a tender in bank notes, when it was obvious that the deponent could not be acquainted with the fact. But

BAYLEY J. held the affidavit sufficient, and said that by the express provisions of the act of parliament, the defendant would not be entitled to be discharged on account of a defect in that part of the affidavit which negated the tender of bank notes, unless he produced an affidavit that there actually was a tender; and as the defendant was not prepared with such an affidavit, the rule must be refused.

Rule refused.

(a) By the statute 43 Geo. 3. c. 12. s. 2. it is enacted, that "in case of any application to any of his Majesty's Courts in *Westminster Hall*, by any person who has been or shall be held to special bail under or by virtue of any process out of such Court, to be discharged upon common bail, by reason of any defect in such part of the affidavit in which he is so held to bail, as negatives or is intended to negative any offer having been made to pay the sum in such affidavit mentioned, in notes of the Governor and Company of the Bank of England; the person or persons making such application so to be discharged shall not be entitled to such discharge, unless he, she, or they shall at the same time make proof, by affidavit, that the whole sum of money for which he, she, or they has or have been so held to bail, had been or was, before such holding to bail, offered to be paid, either wholly in such notes, or partly in such notes and partly in lawful money of this kingdom." See *Brown v. Davis*, H. T. 1819, *Chitty's Prac. Rep.* 161. *Tidd*, 6th ed. 192, 3. But the total omission of the denial of a tender in bank notes is not aided. *Wood v. Jenkins*, 2 *Smith's Rep.* 156; and *Tidd*, 7th ed. 212.

ANONYMOUS.

1815.

28th Jan.

ON shewing cause, by *Gaselee*, against a rule which had been obtained for setting aside proceedings for irregularity, a question was raised whether an attorney at *Deptford*, who had directed the declaration to be sent to him by the post, was to be deemed well served with the declaration, from the time when it was put into the post, or from the time when it reached the hands of the attorney to whom it had been transmitted. In the result, however, it became unnecessary that the point should be determined; an objection being taken to the affidavits filed in support of the fact, on the ground that there were two deponents, and their names were not mentioned in the jurat (*a*).

Names of several deponents must be inserted in the jurat of affidavit.

And the *Court* held the objection valid, and on this ground made the rule absolute.

(*a*) *Vide Tidd*, 516, 7th ed. in every affidavit sworn in this Court before any judge or commissioner, and made by two or more deponents, the names of the several persons making such affidavit, shall be mentioned in the jurat. R.M. 37 *Geo.* 3. K.B. 7 T.R. 82. *Aliter* in the Court of Exchequer, 2 *Price's Rep.* p. 1.

ATKINSON *against* THOMSON.

1816.

23rd Jan.

IN this case, above the jurat, and before the words, "Sworn," &c. The name of the commissioner had been written apparently by mistake, and afterwards erased; and on its being objected that such affidavit could not be read, per

An erasure over the jurat does not vitiate it.

LE BLANC J. Though the rule, 37 *Geo.* 3. declares that no affidavit shall be read or used, in the jurat of which there shall be any interlineation or erasure, yet an erasure over the jurat does not vitiate it. The jurat itself, in this case, is without any defect.

1816.

15th Nov.

ANONYMOUS.

When there is a defect in the jurat of an affidavit on which to found *rule nisi*, it cannot be used, nor will time be given, except in cases of bail.

BOUCHER made a motion, stating that it was necessary it should be mentioned this day; but upon looking at the jurat, a defect appeared in the same, upon which

BAYLEY J. said that he could take no notice of such an affidavit.

Boucher then proposed, that as the affidavit was sworn in *Anglesea* it should be put in, in its present state, and that he might have time allowed to get it resworn.

BAYLEY J. That is invariably refused in all cases, except in those of bail. You had better give notice to the other party of your intention to make this motion, and of your being prevented by this inadvertency; they will then proceed at their peril, and be liable to have their proceedings set aside with costs.

Rule refused.

1815.

24th Nov.

JACKSON *against* TOMKINS.

Rule *nisi* granted to discharge the defendant out of custody on filing common bail, where the debt sworn to was 600*l.* on the balance of an account; and affidavit was made on the part of the defendant that the account had been settled at a much smaller sum (a).

READER moved to discharge the defendant out of custody, on filing common bail, grounding

(a) *Tamen quære.* It is a general rule, not to receive a contradictory affidavit on the merits. *Joulay v. Ellesfen*, 2 East, 453. *Mackenzie v. Mackenzie*, 1 T. R. 717. The same rule prevails in C. P., where, if the plaintiff swears positively to a bailable cause of action, the Court will not try on affidavits whether there is a subsisting debt. *Horsley v. Walstab*, 7 Taunt. 235. 2 Marsh. Rep. 548. But one case is said to have occurred in that Court, in which a defendant was held to bail in trover for the sum of 10,000*l.*; and the enormity of the case, and the nature of the action, induced the Court to discharge the defendant. *Id. ibid.* Even an affidavit of the plaintiff's confession that the defendant owes him nothing, cannot be received. *Per Lee C. J. Emerson v. Hawkins*, 1 Wils. 335, K. B. Tidd, 7th ed. 213, 4.

his motion on an affidavit, that the defendant had been arrested for 600*l.*, being the balance of an account which had been settled between the plaintiff and the defendant, when defendant's affidavit swore that the account was settled in writing, at a much less sum.

1815.

JACKSON
against
TOMKINS.

DAMPIER J. The objection to your application is, that it is trying the merits on an affidavit; but the particular circumstances of this case seem to take it out of the general rule.

Rule Nisi.

AMENDMENT.

1815.

Boys *against* EDMEDS.

25th Nov.

Nisi prius roll amended by inserting a special title to a declaration, defendant having appeared after he came of age, which was after the first day of term (a).

MARRYATT, on a previous day, had obtained a rule to shew cause why the *nisi prius* roll should not be amended, by inserting a special title to the declaration on a libel, the defendant being an infant, at the beginning of the term of which the declaration was entitled generally, and his appearance being recorded as on the day when he became of age.

Knowlys, Common Sergeant, now shewed cause.

LORD ELLENBOROUGH C. J. said that if the rule were to be discharged, the formal part would prevail against the truth, and that the Courts would certainly amend these sort of mistakes ; but he added that the party must elect to proceed either by a civil action or by indictment, and not by both for this libel, and that as it was the plaintiff's own business, and his amendment, he should pay the costs.

Rule absolute, on payment of costs.

(a) Plaintiff will be allowed to amend title of declaration, even after error brought, on payment of costs. *Duckinson v. Plaisted*, 7 T. R. 474. 1 *East*, 134. 1 *Wils.* 78. 8 T. R. 629. 1 *Chitty on Plead.* 2d ed. 266. But the Court of C. P. in a penal action would not alter the memorandum, by inserting another term, without cause being shown by affidavit. *Woodroffe v. Williams*, 6 *Taunt.* 19. 1 *Marsh.* 419, S. C. If an infant defendant appear by attorney, it is a ground of error. *Barnes*, 413. 2 *Str.* 784. And if a minor appears by attorney, the Court, at the instance of the plaintiff, will compel him to amend and appear by guardian. *Hindmarsh v. Chandler*, 7 *Taunt.* 468. 1 *Moore*, 250, S. C.

SOLOMONS *against* JENKINS.

1815.

Easter Term.

THIS was an action of debt for penalties incurred by illegal horse-racing, and the facts were laid to have been committed in the county of Somerset. *Espinasse*, on the part of the plaintiff, had obtained a rule to shew cause why the declaration should not be amended, by inserting in the place of the words "for the poor of the parish of *Wolcot* in the city of *Bath*," "for the use and benefit of the poor persons admitted into the hospital or infirmary erected in the city of *Bath*, for the benefit of the poor persons resorting to the said city for the benefit of the mineral waters there (b)." The offence was committed in *August* last. The writ was issued in Michaelmas term, returnable on the 22d of *November*. Plaintiff delivered his decla-

Amendment allowed in *quæ tam* action, by correcting an error in declaration in the description of the persons to whom part of the penalty was given, though defendant had pleaded early enough for plaintiff to have gone to trial at the assizes after an issuable term, and plaintiff had neglected to do so, and had delayed making up the issue till a subsequent term (a).

(a) In *Dover v. Mestier*, 4 *East*, 437, it was held, that where there has not been any unnecessary delay on the part of the plaintiff in the prosecution of a penal suit, the Court will give leave to amend in that, as well as in any other species of action, 3 *M. & S.* 454, 5. Amendment has been allowed in the name of the defendant after plea of misnomer, *Mestaer q. t. v. Hertz*, 3 *M. & S.* 450. or in the allegation of dates and sums which were material, 2 *Burr.* 1088. 6 *T. R.* 173. even after the time for bringing a new action has expired 7 *T. R.* 55: but the Court of C. P. have refused to alter the term of which a declaration was entitled to a previous term, without a reason being assigned by affidavit, 6 *Taunt.* 19. 1 *Marsh*, 419. *S. C.* As to what is to be considered such laches on the part of the plaintiff as will prevent the amendment from being allowed, see 6 *T. R.* 171. *Steel v. Sowerby*, 2 *T. R.* 707.

(b) The statute 13 *Geo. 2. c. 19. s. 6.* enacts that all penalties incurred by any person for any offence against the act, shall be sued for and recovered by action in his Majesty's Courts of Record at *Westminster*, or at the assizes, and shall be disposed of, one moiety thereof to the use of such persons as shall sue for the same, and the other moiety to the use of the poor of the parish or place where the offence is committed, except such one moiety of such penalties as shall be incurred by and recovered of any persons within the county of Somerset, *which said one moiety shall go and be applied to and for the use and benefit of the poor persons admitted into the hospital or infirmary lately erected in the City of Bath, for the benefit of poor persons resorting to the said City, for the benefit of the mineral waters there*

1815.
 SOLOMONS
 against
 JENKINS.

ration on the 4th of *January* 1815, to plead in the first four days of *Hilary* Term. Defendant pleaded in due time, when, on making up the issue in the present (*Easter*) Term, the mistake was discovered, that the penalty was not given by the statute which prohibited illegal horse-races, to the poor of the parish, but to the infirmary at Bath. The motion was made on the authority of *Maddock v. Sir B. Hammett*, 7 Term Rep. 55.

Gaselee showed cause, and insisted that the plaintiff had been guilty of improper delay, inasmuch as the defendant had pleaded early enough in *Hilary* Term for the plaintiff to have gone to trial at the assizes.

PER CURIAM. The Court will not give leave to amend in a penal action where there has been unnecessary delay, but this is not of that description.

Rule absolute for making the amendment.

1815.
 13th Feb.

ANONYMOUS.

Rule to shew cause at *Chambers*, why judgment entered up by mistake in a warrant of attorney (for a less sum than the sum secured by the warrant of attorney), should not be amended, will not be granted on consent of an attorney who was employed by both parties, but there must be some other person authorized (a).

HEATH moved for a rule to shew cause why the clerk of the judgments should not amend a judgment which he had entered up for 1600*l.* instead of 2600*l.*, the actual sum to be secured by the judgment; and he grounded his motion on an affidavit that it was so done by mistake. Both the parties in the cause employed the same attorney, and a previous application had been made to *Le Blanc J.* at his chambers, to grant this motion; but he then said, that

(a) As to the practice of amending judgments, see *Tidd*, 7th ed. 747. 5 *Taunt.* 557, 8. 3 *M. & S.* 591. 4 *M. & S.* 97. 6 *Taunt.* 45: and as to signing judgment on a warrant of attorney, see *Tidd*, 7th ed. 571.

as it had been a judgment of the Court, it should be moved in the Court; and now *Heath* applied, that the rule should be drawn up for the other party to shew cause at chambers, and

1815.

ANONYMOUS.

LE BLANC J. said that before he could allow the rule to be so drawn up, it was necessary that some person (who was not employed for both parties) should consent that cause should be shewn at chambers, and granted.

Rule Nisi, to shew cause at chambers on such a consent being given.

WRIGHT, q. t. *against* HORTON.

1817.

23rd Jan.

RICHARDSON shewed cause against a rule nisi obtained by *Littledale*, to amend the record in a penal action after verdict for the plaintiff, by adding a *similiter*. *Harris's* case, *Cro. Jac.* 502. and *Rex v. Boyce*, 4 *Burr.* 2084, 5, which had been cited in support of the rule, were distinguished on the ground that they were both cases of indictment, where it was the duty of the officer to make the proper entry, and therefore his laches ought not to injure the party; but this was a penal action, and the record is entirely under the controul of the plaintiff.

A record may be amended in a penal action by inserting a *similiter*, though the objection was taken at the trial ().

See 1 *Stark.* 400. and *Holt* 458. S. C.

LORD ELLENBOROUGH C. J., Is this a penalty in which the crown is interested? [*Richardson* replied in

(a) The Court have allowed a continuance to be added after verdict and judgment for the plaintiff in a penal action, *Wynne v. Middleton*, 2 *Str.* 1227. 1 *Wils.* 125. *Humble v. Bland*, 6 T. R. 255. *Tidd*, 7th ed. 707. And see *Cooke v. Bush*, 5 *Taunt.* 164. where one of the pleas had not been traversed, and the parties went down to trial, and the Court allowed an amendment. In 2 *Saund.* 319. n. 6. and cases there cited, the want of a *similiter* is said to be aided on the ground that an affirmative and negative appear upon the record. As to the effect of taking the objection at the trial, see 4 *Taunt.* 16.

1817. the negative.] Here is nothing to try, for there is no issue joined. The objection being taken at *nisi prius*, ought to have prevailed. He cited *Heath v. Walker*, 2 Strange, 1117, where the objection being taken at the trial the Chief Justice dismissed the jury, considering that he had no commission to try the issue, and he could neither call the plaintiff nor suffer the defendant to take a verdict.

WRIGHT, q. t.
against
HORTON.

BAYLEY J. That was not a penal action; and then it is expressly overruled in *Harvey v. Peake*, 3 Burr. Rep. 1793.

Lord ELLENBOROUGH C. J. In *Sayer v. Pocock*, Cowp. 407. the record was amended after verdict, by adding the words, "and the defendant does so likewise" at the end of the replication; and that case was decided on the ground that the omission was the act of the clerk (a). [*Richardson* admitted that that was a very strong case,] and Lord *Ellenborough* C. J. said, that answers the argument as to the distinction between a civil action and an indictment. According to *Sayer v. Pocock*, even in civil actions, the insertion or omission of the *similiter* is to be considered the act of the clerk.

BAYLEY J. Even in a penal action the Court is bound to presume that all that is actually alleged was fully proved. Penal actions and indictments are not on the same footing, as to verdict curing omissions or defects in form.

Lord ELLENBOROUGH C. J. A verdict cures in all actions, though not in indictments.

PER CURIAM. Rule absolute.

(a) *Tidd*, 759, and cases there cited.

DOUBLEDAY *against* ———.

1817.

16th May.

RICHARDSON moved in an action on a judgment, that the record of the judgment should be produced and shown. The record of the judgment was produced accordingly, and it was insisted that there were two material variances between the record and the declaration. First, it was alleged in the declaration, that judgment had passed in an action by bill, when the record produced, was by original. Secondly, a difference existed in the description of the parties.

If on issue on *nul tiel* record there is a variance, the Court will permit amendment on payment of costs (a).

Parke contra, appeared for the plaintiff, and prayed leave to amend on payment of costs.

The COURT granted leave to amend.

(a) In *Blackmore v. Fleming*, 7 T. R. 447. where there was a failure of record on the ground of the description of defendant being different in the judgment from the declaration, the plaintiff had leave to amend, on payment of costs, defendant being at liberty to plead *de novo*. So amendment has been allowed in record of outlawry, in order to support allegation that defendant had been outlawed, on an issue taken on *nul tiel* record, 1 Wils. 78. and see *Tidd*, 6th ed. 744.

STORER *against* GORDON.

1815.

8th May.

MARRYATT shewed cause against a rule obtained by *Parke*, for amending the pleas in this action, after a verdict had been obtained for the plaintiff. He said that there was no case where the Court had permitted the defendant to amend his pleadings after trial and verdict, and oblige the plaintiff to go down to trial again. And he cited *Robinson v. Rayley*,

After trial and verdict for the plaintiff, defendant allowed to amend pleas, and have a new trial, on payment of costs (b).

(b) The plaintiff has been allowed to amend the declaration after verdict, by increasing the damages according to the truth of the case as found by the jury, the verdict being set aside and a new trial granted, to enable the defendant to make his defence to the demand so enlarged, *Tomlinson v. Blacksmith*, 7 Term Rep. 132.

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STORER
against
GORDON.

1 *Bur.* 316, 321. *Rex v. The Mayor of Grampound*, 7 T. R. 699. in which case an amendment was attempted, but was disallowed.

LE BLANC J. hesitating, asked if there was not any case in which the defendant had been allowed to amend the pleadings with a new trial, and said that certainly it must be accompanied with a new trial.

LORD ELLENBOROUGH C. J. There are a hundred cases to that purpose.

DAMPIER J. The whole record was now modelled in *Rex v. Ancor*.

Abbott said that there was a late case in a *quo warranto*, where an amendment was made of as great an extent as that now prayed for.

Scarlett and *Marryat* contra. It is always done to further the justice of the case, as was said by Lord *Kenyon*, Ch. J. in *Rex v. Grampound*; and they then went into the merits.

Attorney General contra.

Rule absolute.

1822.

Easter Term.

DARTNALL *against* **HOWARD AND GIBBS.**

Amendment allowed after nonsuit, where fresh action otherwise barred by statute of limitations.

ACTION of assumpsit for negligence in investigating the security for an annuity which defendants negotiated for plaintiff. On the trial the plaintiff submitted to be non-suited, on account of a variance between the facts proved and stated in the declaration. *Scarlett* and *Tindal* moved to set aside the nonsuit and amend declaration, so that plaintiff might have a new trial, it being too late to bring a fresh ac-

tion, as the defendants would plead the statute of limitations, that the causes of action accrued upwards of six years ago.

The *Solicitor General, Gurney, Denman, and Chitty*, shewed cause, and contended, that as the plaintiff had so long delayed bringing his action, and the defendants had since the supposed negligence become bankrupts, and would obtain their certificates, but which would be no bar to this special action, the motion ought not to succeed, and that there was no instance in which the Courts had thus indulged the plaintiff, after he had submitted to a nonsuit on account of a defect in his own pleadings. But the Court pronounced the Rule absolute.

1822.

DARTNALL
against
HOWARD AND
GIBBS.

1815.

PEARMAN *against* **CARTER.**

9th Feb.

BEST, Serjeant, on a previous day, had obtained a rule to shew cause why an order of *nisi prius* should not be amended, by inserting that each party should pay his own costs. The order directed costs to be paid by the party against whom the arbitrator, (to whom the cause was referred on withdrawing a juror) should decide; and it was now contended that it was understood between the parties that each person should pay his own costs. To authenticate this statement the counsel produced a paper containing the terms upon which the cause was referred, signed by the counsel on both sides: but Lord *Ellenborough* C.J. said, that though the import of the paper produced was against the order as drawn up, yet as the understanding of the parties seemed uniformly from the beginning to the end of their proceedings to have been against the paper, it would be too much to say that that document should prevail against the strength of the evidence which appeared in favour of the order. The

Order of *nisi prius* refused to be amended according to the terms contained in a paper signed by the counsel at the trial, the intention of the parties appearing from their subsequent acts to have been in favour of the terms of the order.

Court were therefore of opinion, that the rule ought to be discharged.

Rule discharged accordingly.

1815.

M. T. 25th Nov.

PATERSON *against* EVERARD.

Where a plea was pleaded to the whole declaration, but the matter of the plea was in truth but an answer to part, and a verdict was obtained and judgment given for the plaintiff, and a writ of error brought, the Court refused to allow an amendment in the record, by inserting judgment by *nil dicit* to the part unanswered, on the ground that such amendment was unnecessary (*a*).

THE action was in debt, on an arbitration bond for the non-performance of an award, and the second count of the declaration was on an account stated. The defendant's plea was framed as an answer to the whole declaration, but in fact the matter pleaded was only an answer to the first count, and after judgment for the plaintiff, error was assigned in the Exchequer Chamber, on the ground that the plea only answered part of the declaration, and that the issue joined was wholly immaterial and impertinent as far as related to the second count of the declaration.

Littledale, on a former day, obtained a rule to shew cause why the roll should not be amended, and the plaintiff be allowed to take judgment by *nil dicit* to the count unanswered.

Nolan now shewed cause, and said that there were many cases to shew that such an application was *not* favoured.

(*a*) When this case was argued in the Exchequer Chamber, on a writ of error, it was contended, that the action was discontinued, and that the plaintiff could not maintain his judgment, on the ground of the defect in the plea; but the Court overruled the objection. The plea did purport to answer the whole scope of the action, though the matter pleaded, namely, that the plaintiff had recovered one half of his demand, was not an effectual bar to his action for the other half, and the plaintiff might have taken advantage of the weakness of the plea upon demurrer; but the action was not discontinued, and these circumstances are not a ground of error. The judgment was reversed as to the first count, and also as to the award of damages and costs, because being given generally, they applied to the whole declaration; but judgment was affirmed as to the first count, in which there was no defect. 6 *Taunt.* 645. 2 *Marsh.* 304. S. C.

LORD ELLENBOROUGH C. J. The defendant's plea commenced *actionem non quia*, the plaintiff had before impleaded him on the same bond and recovered judgment, and concluded *si actionem*, &c. generally. This is certainly a bad plea to the whole declaration; the defendant has, in fact, said nothing that affords an answer to the second count: but nevertheless it is a plea, and you had better consent to his amending, on payment of costs.

1815.

PATERSON
against
EVERARD.

BAYLEY J. said, that there was a difference between a bad plea to the whole declaration, where judgment cannot be signed for want of answer to any particular fact, and a plea which only applies to part, where judgment must be taken for the part unanswered, or the action will be discontinued. *Willes*, 480. (a).

The COURT thought the amendment prayed would be *unnecessary* and useless, and said that the rule must be discharged, *but without costs*.

Rule discharged accordingly.

(a) Sec 1 *Saund. Rep. by Serjt. Wms.* 28. n. 3.

ANNUITY.

1817.

18th June.

ALLWOWAY *against* HILL.

On judgment by default in covenant for arrears of an annuity, the Court will grant a rule for reference to the Master to compute arrears (a).

ESPINASSE moved for a rule to shew cause why it should not be referred to the Master to see what was due for the arrears of an annuity, and that the plaintiff should be at liberty to sign final judgment and take out execution. The affidavit in support of the motion stated that the action was brought on a covenant in an indenture for securing the payment of an annuity of 20*l.* a year; and that a year's interest being then due, the plaintiff had brought an action on it, and had obtained interlocutory judgment.

THE COURT granted a rule *nisi*, which was afterwards made absolute on the last day of Term: no cause being shewn on the part of the defendant.

PER CURIAM. Rule absolute for the reference to the Master.

(a) So a rule will be granted for the Master to compute principal and interest in an action of covenant on a mortgage deed, *Berthen v. Street*, 8 T. R. 326; *Holdep v. Otway*, 2 Saund. 106, 107. note 2; or on a covenant for rent, 6 Taunt. 356; *Campion v. Craushaw*; but not on a simple contract for rent, or in action for use and occupation. *Id. ibid.* see *Tidd*. 7th ed. 588, 9.

1813.

31st May.

AMSTEAD *against* ATKINS.

On a motion to set aside an annuity after a great lapse of time, on the ground of a misstatement in the consideration, the affidavits should state that the parties are alive (b).

TOPPING moved for a rule to show cause why a judgment, entered up on a bond given for security, should be set aside on the ground of a misstatement in the consideration, the affidavits should state that the parties are alive (b).

(b) When an objection was taken to an annuity, on the ground that

ing an annuity, should not be set aside. The memorial was dated the 17th day of *January*, 1802. And the objection was, that it stated the consideration to have been paid down, when it was not so in fact; and it also appeared that part of the consideration money was retained at the time of granting the annuity. These facts were supported by affidavits.

1813.

AMSTEAD
against
ATKINS.

The Court granted a rule *nisi*; and it was laid down by LE BLANC J. that as eleven years had been suffered to elapse since the annuity was granted, the affidavits in support of the application ought to state that all the parties were alive.

some of the deeds were not attested by all the persons mentioned in the memorial, the Court, on application, set aside the warrant of attorney, even at the distance of twenty years, and after the principal parties and witnesses to the transaction were dead, the merits of such objection not depending on testimony lost by the delay, *ex parte Sir R. Mackreth*, 2 *East*, 563. However, in general, where it appears that the applicant has acquiesced in the payment of the annuity, and has lain by for a considerable space of time, and till the persons acquainted with the transaction are dead, the Courts will refuse to interfere in his behalf in a summary manner. *Ex parte Maxwell*, 2 *East*, 85; *Houlé v. Cabanus*, 8 T. R. 328. The 53 *Geo. 3. c. 141. s. 6.* (passed 14th *July*, 1813,) makes the following provision for annuities granted after its enactment. "If any part of the consideration for the purchase of any annuity or rent-charge shall be returned to the person advancing the same; or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods; or if the consideration, or any part of it, shall be retained on pretence of answering the future payments of the annuity or rent-charge, or any other pretence; in all and every the aforesaid cases, it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the Court in which any action shall be brought for payment of the annuity or rent-charge, or judgment entered by motion to stay proceedings on the action or judgment, and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall be lawful for the Court to order every deed, bond, instrument, or other assurance whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated. Before this act was passed, annuities were regulated by the 17 *Geo. 3. c. 26. s. 1.*

1815.

10th Feb.

ANONYMOUS.

Judgment on warrant of attorney to secure annuity set aside, because there was no memorial, though it was omitted at the request of the grantor. But Court refused to take the warrant of attorney off the file (a).

READER shewed cause against a rule which had been obtained by *Adolphus*, for setting aside a judgment entered up upon a warrant of attorney given for securing an annuity. The rule was obtained upon the ground that no memorial had been enrolled. It now appeared that the enrolment was omitted at the request of the defendant, and therefore it was contended that he was not in a condition to make this application, as he would thereby be taking advantage of a defect which he himself had occasioned.

LE BLANC J. said, that the act was imperative, and that it made no difference that the applicant had been the cause of the omission. *Adolphus* then applied, that the warrant of attorney might be taken off the file; but LE BLANC J. said, that the Court could not allow that to be done.

Rule absolute.

(a) In *Lec v. Daniel, Barnes*, 8. On a motion to amend, (the alterations being very long, and such as would greatly deface the roll) it was argued that a *vacatur* might be marked on the roll filed, or it might be taken off the file, and a new roll of the same number filed in its place. *Sed per Curiam*. That practice is not warrantable : and the motion was denied.

APPEARANCE.

ANDERSON *against* REYNOLDS.

1813.

31st May.

COMYN on a former day had obtained a rule to shew cause why the proceedings should not be set aside for irregularity, on the ground that the plaintiff had signed judgment as for want of a plea, before the defendant had appeared (or was bound to appear), the plaintiff having allowed only four days after the *quarto die post* for the appearance to be entered.

An appearance by original should be entered within eight days after the *quarto die post* of the return of the writ. In proceedings by original, the defendant has eight days after the appearance day, or *quarto die post*, to appear.

Lawes now shewed cause, and

Comyn, in support of the rule, cited *Tidd Prac.* 3 ed. 239. 371 (a), and contended, that an appearance upon an original may be entered at any time within eight days after the appearance day, or the *quarto die post* of the return of the writ.

BAYLEY J. The Master informs me that the practice is so.

Lawes then observed, that the defendant had more time to enter an appearance in an action by original, when no bail is required, than he would on bailable process.

(a) *Vide Imp. K. B.* 592; *Tidd*, 6th ed. 246. 7th ed. 265. The statute 5 Geo. 2. c. 27. directs, that if the defendant having been served with process, shall not appear at the return thereof, or within eight days after such return, the plaintiff, upon affidavit of the service of such process, made before a judge or commissioner of the Court for taking affidavits, &c. may enter a common appearance, or file common bail for the defendant, and proceed thereon.

1813.

ANDERSON
against
REYNOLDS.

LE BLANC J. referred *Lawes* to *Tidd's Practice*, and said, that if that was correct (which had been admitted) the plaintiff had proceeded irregularly.

Rule absolute.

1813.

22nd June.

ANONYMOUS.

A rule nisi granted, why defendant's attorney should not enter a common appearance in consequence of verbal undertaking to appear (a).

STALEY moved for a rule to shew cause why the defendant's attorney should not enter a common appearance, on an affidavit stating, that the agent of the plaintiff's attorney, before he sent the writ into the country to be served, had applied to the agent of the defendant's attorney to know if he would undertake to enter an appearance, and he answered yes; and in consequence of that engagement the writ had not been formally served. It was urged, that such a verbal promise should be as effectual as if reduced into writing.

The Court granted a Rule *Nisi*.

(a) By rule of K. B., *M.* 1654. sec. 10. an attorney of either bench accepting a warrant, or *subscribing a process, declaration, or warrant to appear*, is compelled to cause an appearance to be entered, or liable to an attachment, or put out of the roll, as the case requires; and in *Loft's Rep.* 192, 3, it was held, that the undertaking to enter an appearance, must be in writing, see *Tidd*, 7th ed. 266. n. 1.

1817.

1st May.

BOUND against VAUGHAN, M. P.

Costs of *distraint*, directed to be paid by the defendant, and for the sheriff to sell the issues to pay such costs, though the defendant had appeared after the issues were levied, but before they were sold (b).

BAYLEY, Robert, moved for a rule to shew cause why the master should not tax the costs of a *dis-*

(b) By the statute 10 *Geo.* 3. c. 50. it is enacted, "that the Court out of which the writ proceeds may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the said Court shall think just, under all the circumstances, to order, and the surplus to be retained until the defendant shall have appeared, or other purpose of the writ be answered." See 1 *Tidd*, 6th ed. 106.

tringas, &c. and why the late sheriff of *Cardigan* should not sell the issues to pay such costs. The defendant had appeared after the issues had been levied, but before they were sold; and in support of this motion he referred to the statute 10 *Geo. 3. c. 50. 5 Burr. 2725.*

1817.
BOUND
against
VAUGHAN.

The Court granted a rule *nisi*, and it was afterwards, without opposition, made

Absolute.

ANONYMOUS.

1815.
E. T. 8th May.

BROUGHAM on a former day had obtained a rule to shew cause why a judgment of *non pros.* should not be set aside on the ground of irregularity, the defendant having signed the judgment before an appearance entered.

Defendant cannot sign judgment of *non pros.* before an appearance is entered; and when special bail is required, the appearance is not complete till bail are perfected (a).

Comyn shewed cause against the rule, and cited the case of *Prigmore v. Bradley*, 6 *East*, 314. where it was held that an appearance entered after the essoign day, and before the first day of full Term, might be entered as of the preceding Term; and therefore a *non pros.* entered after the second Term, for want of declaring before the end of such second Term (a) was good.

BAYLEY J. referred to the statute 13. *Car. 2. st. 2. c. 2. s. 3.* and the case of *Prigmore and Bradley*, and said, that in that case there was an appearance entered in the Term in which the writ was returnable; but here the defendant had not appeared at all, for the de-

(a) *Vide Tidd*, 6th ed. 248. 472. It is a general rule, that a *non pros.* can never be signed, unless bail be filed, or an appearance entered, of the term wherein the process is returnable. *Holmes v. White*, *id ibid.* 6 *East*, 314.

1815.
ANONYMOUS. fendant had not justified bail, and he had not effectually appeared till bail were perfected.

Brougham. In this case they were special bail.

Comyn contended, that the case above cited shewed, that provided the bail were filed in the Term in which the writ was returnable it was sufficient.

BAYLEY J. That is common bail, which is the appearance; but here the appearance is not complete without special bail are perfected.

ARBITRATION.

SACKETT *against* OWEN.

1813.

23rd Nov.

DAUNCEY had obtained a rule *nisi* to set aside an award, on the ground that the submission was obtained by fraud, the party not knowing what he was signing. He referred to the statute 9 and 10 *Will.* 3. c. 15. sec. 2. by which it is enacted, that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void, and of none effect, *and accordingly be set aside by any court of law or equity*, so a complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next Term after such arbitration made and published to the parties.

Rule refused to motion to set aside an *award*, on the ground that the *submission* had been obtained by fraud; the application should have been made to set aside the order (a).

Where the submission has been obtained by fraud, that may be given in evidence under a plea of *non assumptit*, or *nil debet*.

Peake shewed cause on two grounds, namely, first, that the defendant had died since the rule *nisi* was obtained; and secondly, that the fraud would be an answer to an action on the award. He said that the submission must be set out in the declaration, and supported by evidence at the trial. It was nugatory, therefore, to apply to the Court to set aside the award, when it could never be available to the party in whose favour it was made.

GIBBS C. B. The first section of the statute 9 and

(a) So if, upon a reference, either party is precluded by the terms of the rule, from going into evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference, but he cannot impeach the award. *Doe v. Bailiff and Burgesses of Morpeth*, 3 Taunt. 378. *Prosser v. Corringe*, 3 Taunt. 432.

1813.
 SACKETT
 against
 OWEN.

10 *W. S.* authorizes parties, in certain cases, to agree that the submission shall be made a rule of Court; and the second section directs, that any arbitration or umpirage procured by corruption or undue means, shall be judged void, and be set aside by the Court. The present application should have been to set aside the order, making the submission a rule of Court, and should have been founded on the former clause of the act. The word arbitration, in the second section, must mean the award; but here the objection does not go to the award, but the order under which the award was made.

PER CURIAM.

Rule discharged.

N. B. The Court expressed an opinion, that if an action was brought on the award, defendant might plead no submission, and shew the fraud, which would authorize him to treat it as no submission: or if an action was brought, it seems that the defendant might plead no award, and shew that the submission had been obtained by fraud. *Per GIBBS, C. B. and THOMPSON B.* The plea of no award is sustainable where there has been an award in fact, but not according to the submission; as when an award is made of matters not submitted to the arbitrator. *Fisher v. Pimbley*, 11 *East*, 188. See *Godson v. Brooke*, 4 *Campb.* 163, 4.

1815.
 7th Feb.

*In re WANSBOROUGH, and WANSBOROUGH against
 DYER.*

An agreement
 stamp is not
 necessary to

arbitration bond, containing besides the usual covenants an agreement as to payment of costs (a). Trustees of insolvent debtor entering into arbitration bond, admit that they have assets, and may be directed to pay costs (a).

A RULE *nisi* having been obtained for an attachment for non-performance of an award made between

(a) If an award be made on an improper stamp, and no application be made to enforce award, the Court will not set it aside. *Preston v. East-*

the parties in this cause, a rule was afterwards obtained to set aside the award. Both rules now came on together. An objection was first taken to the stamp on the arbitration bond. After all the usual clauses, a stipulation was inserted respecting the manner in which the costs should be paid. This was contended to be a substantive agreement, and required an agreement stamp : but the Court overruled the objection. Secondly, it was objected, that the award directed the trustees of an insolvent debtor to pay the costs : *sed per Curiam*. The trustees, by entering into the bond, confessed that they had sufficient funds ; and by referring all matters in difference, and agreeing to pay what should be awarded, they have made themselves responsible for the payment of costs.

1818.

*In re WANS-
BOROUGH, and
WANSBO-
ROUGH against
DYER.*

PER CURIAM. Rule for attachment affirmed with costs.—Rule to set aside award discharged with costs.

Gifford for trustees, and in support of the rule to set aside award.

West supported rule for attachment for not performing award.

wood, 7 T. R. 95. The act of submitting to arbitration does not of itself make a trustee or administrator personally liable to costs. *Davies v. Ridge*, 3 Esp. Rep. 101 ; but a submission to arbitration by an executor or administrator is in general considered as a reference not only of the cause of action, but also of the question, whether or not he has assets, and then when the arbitrator has awarded the executor or administrator to pay a certain sum of money, it is equivalent to determining that assets existed, *Worthington, v. Barlow*, 7 T. R. 453 ; *Pearson v. Henry*, 5 T. R. 6. *Barry v. Rush*, 1 T. R. 691.

1818.

11th Feb.

EARDLEY against OTLEY.

Under what circumstances the Court will set aside an award, where it is suggested that new evidence has been discovered.

MARRYAT and *Comyn* having on a previous day obtained a rule to shew cause why an award of counsel should not be set aside, on the grounds which appeared in the affidavit to support the motion ; they now appeared, and moved to make their rule absolute ; but failing so to do, applied to the Court to let the matter go back again to the arbitrator, on an affidavit, that the party had procured new evidence since the reference.

BAYLEY J. You should have applied to the arbitrator to delay making his award, and appoint another meeting to hear the additional evidence.

Comyn said, that the evidence was not discovered till after the award was made.

ABBOTT J. That is not sufficient ; you must shew by affidavit what it was, as in the case of a new trial on the same ground, that there was some surprise, and that it was not such evidence as a reasonable man might anticipate.

BAYLEY J. That is not sufficient. The affidavit should go further, and shew that it was such evidence as a reasonable diligence could not have obtained.

Scarlett contra.

Rule discharged.

SNOOK *against* HELLYER.

1818.

27th Jan. H. T.

BAYLEY shewed cause against a rule which had been obtained by *Pell* Serjeant, and *Chitty*, to set aside an award, on two grounds; namely, first, that the money was awarded to be paid to a stranger; and secondly, that the party for whose benefit the money was to be paid, had become bankrupt. The Court, upon the first point, were clearly of opinion that an award, directing payment to one person for the use of another, was good; and though the party to receive the money did not appear to be invested with any express authority by the person for whom the money was to be paid, the award was nevertheless sufficient; and they said, that supposing the person to receive the money was a banker, it would do; and here it was to be paid for the *use* of one of the parties to the submission. It appeared from the affidavit that the person was agent; and though it was urged that he was not invested with any agency for this purpose, yet the Court said that that circumstance made no difference. Upon the second point, that *Hellyer*, for whose benefit the money was awarded, had become bankrupt, *Bayley* in showing cause, stated that *Hellyer* had assigned all his interest in the sum to be awarded to *John Reed*, (for whom he now appeared,) and therefore, as *Reed* was beneficially interested, it was contended that nothing would pass by the assignment under the commission to the assignees of *Hellyer*; *Winch v. Keely*, 1 T. Rep. 619; and consequently there would be no pretence on this ground for setting aside the award.

An award that money shall be paid to a stranger for the use of one of the parties to the submission, sufficient (a). Court will not set aside an award on the ground that one of the parties had become bankrupt before the making of the award (b). If motion for setting aside an award be made on slight grounds, the rule will be discharged with costs.

(a) *Vide* 1 Salk. 74. 1 Rol. Abr. 248, l. 5. Cro. Car. 433. 3 Leo. 62. Dyer, 242, b. Com. Dig. Arbitrament, E. 7.

(b) See *Kimear v. Tarrant*, 15 East, 622. 8 T. R. 140. 6 Taunt. 123. 1 Holt, 172.

1818.

SNOOK
against
HELLYER.

ABBOTT J. If an action is brought on an award, if bankruptcy is an answer to it, it may be pleaded. It is not fit to be decided on a motion.

LORD ELLENBOROUGH C. J. It should be put on the record, and the rule should be discharged with costs, for awards are not to be set aside, and motions made for that purpose on slight grounds.

PER CURIAM. Rule discharged, with costs.

1814.

25th Jan.

ANONYMOUS.

Award, in an action for not repairing, made by arbitrators upon view of the premises without calling the parties before them, will be set aside(a).

AFTER an action brought for not repairing a house, &c. the matters in difference had been referred to arbitrators, who made their award upon a view of the premises, without calling the parties before them. The Court set aside the award; and **LORD ELLENBOROUGH C. J.** said, that though the premises might almost tell their own tale, yet there might be other facts which should be enquired into, such as payments by the party, or excuses for not repairing, &c. &c.

(a) Want of notice of the meeting is a ground for setting aside an award. *Salk. 71. Caldwell on Arb. 45.* Partiality and improper conduct in the arbitrator in making his award, cannot be pleaded in bar to an arbitration bond, but is only a ground for an application to the Court. *Braddick v. Thompson, 8 East, 344.*

1813.

26th June.

ANONYMOUS.

Rule granted to set aside an award on application of party in whose favour it was made, it appearing that a sum had been omitted by mistake (b).

CASBERD moved to set aside an award in favour of his own client, on affidavit of acknowledgment by the arbitrator and defendant, that a considerable sum had been by mistake omitted to be awarded to his client.

Rule nisi granted.

(b) In *Rogers v. Dallinur*, 6 Taunt. 111, the Court of C. P. in a case similarly circumstanced, held, that a rule absolute might be pronounced either to set aside the award, or to send back the case to the same arbitrator, or to amend the award by altering it to the enlarged sum.

ANONYMOUS.

1813.

12th Nov.

ADOLPHUS moved to set aside an award.

The submission expressed, that the arbitrator should be at liberty to make "another" application to the Court for an enlargement of the time in which he was to make his award. Many applications had been made and enlargements accordingly, and the question upon the present application was, whether "an application" was to be construed to mean only one application, or whether several applications, from time to time, could be said to be within the meaning of the terms of the submission.

Where arbitrator has power to make application to the Court for enlargement of the time for making his award, he may make several applications, and is not *functus officio* at the expiration of the time granted by the first enlargement (a).

DAMPIER J. said, he was inclined to the latter opinion, but wished the point to be considered, and the construction settled.

Bolland contra, stated that it had been decided in the Common Pleas, (a) that where the submission was, that the arbitrator might apply to enlarge the time for making his award, it meant that he might do so from time to time. But DAMPIER J. wished the point to be settled in this Court, and therefore granted a rule *nisi*, which was afterwards discharged without costs.

(a) See *Payne v. Deakle*, 1 Taunt. 509. *Barrett v. Parry*, 4 Taunt. 658.

ARREST.

1817.

24th April.

FORSTER *against* HOPKINS.

King's servants. Lighter of the fires and candles to the king's yeomen of guards held entitled to be discharged out of custody on filing common bail, it being sworn that defendant had sometimes executed the duties of his office in person, though they were in general performed by deputy (a).

PULLER moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, on an affidavit stating that he was invested by patent with the office of lighter of the fires and candles to the King's yeoman guard. On investigation it appeared that the defendant executed the office by deputy, and in point of fact he was hired at *Windsor*, at which place he resided in a different capacity. He cited the case of *King v. Forster* and another, where the defendant had been appointed coachman to his Majesty, and the Court of Common Pleas ordered the bail-bond to be delivered up to be cancelled; and they observed it was the privilege of the King, and if the defendant's employment was not colourable, but his real occupation, he was entitled to be discharged.

LORD ELLENBOROUGH C.J. In that case, the office was one immediately about the King; and we certainly should not be disposed to deprive the Crown of any privilege to protect its menial *servants*. But the office must not be used as mere pretence. Here the party does not appear to have ever acted, and the claim is founded merely on his appointment.

BAYLEY J. In the case cited, the servant was always

(a) *Luntley v. Battine*, 2 B. & Ald. 234, where Court would not discharge a gentleman of privy chamber on motion, but left him to plead his writ of privilege. It did not appear in that case that defendant had performed the duties of his office.

within call; but in the present case, the defendant does not appear to be engaged in any active duty.

Rule refused.

1817.

FORSTER
against
HOPKINS.

Marryat on a subsequent day in the same Term, made another application for discharging defendant out of custody on filing common bail, and the affidavit disclosed the circumstances under which it was contended that defendant was entitled to the exemption. The affidavit stated that defendant was servant to the King, regularly sworn, and having an appointment from the Chamberlain; that the defendant had sometimes executed himself the duties of the office, and now was an attendant on the King at *Windsor*, in another capacity. And upon these circumstances being disclosed, the Court granted a rule *nisi*.

Gaselee afterwards shewed cause against the rule obtained by *Marryat*, on the ground, that the office in question, namely, that of lighter of fires and candles to the yeoman guard at *St. James's*, was not an office immediately about the King, nor such as would deprive a creditor of his right to arrest defendant. He produced an affidavit from the Board of Green Cloth, stating that they had seen nothing of defendant, except of the drafts for his pay, and it appeared that he was a painter hired at *Windsor*, and had no other residence. It followed, that his duties could not be such as would protect the person of the officer from arrest.

Marryat contra, said that the affidavits shewed that defendant had executed the office frequently before his arrest, and was liable to be 'called upon at any time. Being every moment liable to be summoned to the performance of the duties of his office, the right of arresting his person was necessarily inconsistent with those duties.

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LORD ELLENBOROUGH C.J. Though the defendant is not an officer immediately engaged about the person of the King, yet he is attached to those who are about the King. The defendant has positively sworn that he has executed the office; and therefore I think he ought to be discharged; otherwise, doubts might have been entertained.

Rule absolute for discharging defendant.

1813.

29th Jan.

BATSON *against* M'LEAN.

Court refused to discharge major of the Tower out of custody, on the ground that he was arrested when returning from an attendance on the Prince Regent, it not appearing that he had been attending by the command of his Royal Highness. If an officer is privileged from arrest by his warrant or commission, such warrant should be shown to the Court. Where there were contradictory affidavits as to the place where the defendant was arrested, Court refused to discharge him, on the ground that the privilege of the place made the arrest illegal (a). Arrests cannot be made within the Tower—*Semb.*

PARKE had obtained a rule to shew cause why the defendant should not be discharged out of custody, on the ground of his being privileged from arrest as major of the Tower of *London*.

Lord ELLENBOROUGH C. J. observed, that the major of the Tower was not deputy constable.

Scarlett now shewed cause. Defendant's affidavit states that persons resident in the Tower are not liable to be arrested for debt, without leave obtained from Lord *Moir*. Now yeoman warders are exempted from arrest, but then they are expressly protected by the terms of their warrant; and here it does not appear that any warrant has been granted for the immunity of the defendant. The circumstances are these; defendant had been to *Carlton House*, to the Prince Regent, on official business; as he was returning, he was arrested when he got out of his carriage, within the liberties of the Tower. The Tower is neither within the county of *Middlesex* nor the city of *London*,

(a) In *Luntley v. Battine*, 2 B. & Ald. 234, Court refused to discharge from arrest a gentleman of the Privy Chamber, the question of privilege being doubtful, and left the defendant to his writ of privilege. Statutes for protecting soldiers from arrest, do not extend to *commissioned* officers. *Tidd*, 207, 6th ed.

and consequently an arrest is never made in the Tower without leave from the Governor, to obtain which it is always the custom for an officer of the sheriff of *London* or *Middlesex* to apply, and it is never refused. [Lord ELLENBOROUGH C.J. Are the yeomen warders under the command of the Mayor? *Attorney-General*. That does not appear.] *Scarlett* continued. Admitting that the defendant is exempt from arrest, without leave of the King, within the *precincts* of the Tower, it does not follow that the same immunity exists within the *liberties*. There are three grounds of exemption stated on the part of the defendant; namely, 1. personal exemption; 2. official exemption; and, 3, an exemption arising from the privileges of the place. The last is the only material one. According to our affidavits the arrest was made twenty yards to the northward of the Spur Gate; in the defendant's affidavit it is stated to have been to the westward.

The *Attorney-General* said that all the documents were not before the Court, and hoped they might be laid before them.

Lord ELLENBOROUGH C.J. If the application is founded on a *privilegium loci*, the preponderance of evidence is in favour of the plaintiff. If, on the other hand, the defendant rests upon an official exemption, the commission or warrant should have been produced. If the exemption was personal, and derived from the service in which the defendant was immediately engaged, certainly he has the privilege *redundo*. However, it does not appear that there was any command from the Prince Regent for the defendant to come to him, the defendant only *thought* he had official business with the Prince Regent; but unless it was part of the defendant's duty to make this

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journey, it does not appear to us how he can be entitled on this ground to the indulgence claimed.

Attorney-General. The defendant swears in his affidavit that he cannot leave the Tower but on business connected with his official situation.

PER CURIAM. Then he should have produced the commission, or have shewn an order or command for leaving the Tower, as his own affidavit states that he cannot leave the Tower without an order.

Marryat. Our affidavit states that the arrest took place within the county of *Middlesex*.

LORD ELLENBOROUGH C.J. The affidavit only states that the place was within the liberties of the Tower, which is in the county of *Middlesex*, and not within the city of *London*. But with respect to the place where the arrest was made the affidavits vary. The affidavits on the part of the plaintiff say that it was made considerably to the northward of the Spur Gate, but the defendant's affidavit states that it was to the westward, and by their northern swearing they have defeated you.

Rule discharged.

N. B. The arrest was made under the warrant of the sheriffs of *London*. In a case between the same parties, *Batson v. M'Lean*, *M. T.* 1815, Nov. 27., on a rule *nisi* being obtained for discharging the defendant out of custody, LORD ELLENBOROUGH, C.J. observed, that if the arrest appeared to have been made within the Tower, there could be no doubt that it would be wrong.

BATSON *against* M'LEAN.

1815.

29th Nov.

PARKE moved for a rule *nisi* to discharge the defendant out of custody, on the ground of his being privileged as deputy of Lord Moira, the Governor and Major of the Tower. On the day on which the arrest took place the defendant had been to *Carlton House*, attending the Prince Regent on the King's service, and was arrested in a coach as he returned, without the gates of the Tower. It was contended that the Tower was privileged as one of the royal palaces. Queen Elizabeth was the last who resided there in person. The King's servants (namely, the yeomen) reside there now; and these circumstances are sufficient to invest the Tower with the privileges of a royal residence. In *Winter v. Miles*, 10 *East*, 578, it was held that *Kensington Palace* was privileged, on the ground that it had been kept in a state of preparation to receive his Majesty, with the officers and servants residing and doing duty there. In *Elderton's* case, 2 *Ld. Raym.* 978, Lord HOLT doubted whether "when the queen and the whole Court, and all the officers are removed, the place could be considered as having the privilege of a royal palace;" and in another report of the same case, 3 *Salk.* 234. Lord HOLT is stated to have held, that where there was a total absence, where the Queen was neither present in person, nor by her domestics, or any of her family, the place was not privileged. But the present case steers clear of that objection. Then as to the extent of the privileged district, he produced the affidavit of several persons of the ordnance who have resided in the Tower, that fifteen yards paved from the gate of the Tower are equally privileged with the Tower itself. In Lord Ferrar's case, 10 *State Trials*, it is stated to be the

An arrest within the Tower would be bad. But the Deputy Governor is not privileged as such.

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against
M'LEAN.

usual place without the gates of the ^{the}Tower of *London*. The Spur Gate is within the precincts. If an ordinary person was there arrested, or in the Tower, perhaps the arrest would be good, though the officer would be punished. But here Col. *M'Lean* was the commanding officer. [Lord ELLENBOROUGH C. J. That is contending for his personal privilege, every where. It is only the privilege of his office; and can it be considered as protecting the officer when not engaged on duty?] There are many cases to that extent. In *Bartlett v. Hebbs*, 5 T. R. 686. the defendant was junior clerk in the King's kitchen at *St. James's Palace*, and the Court held that he was entitled to be discharged on motion. It is the privilege of the King, and not of the servant. In the case of *King v. Foster* and another, 2 Taunt. 167, a person who had been appointed coachman in ordinary to his Majesty, was held entitled to be discharged, in respect of his liability to be called upon to perform the duty.

Lord ELLENBOROUGH C. J. Do you contend that the commanders of fortresses, &c. are privileged? If you cannot go to that extent it does not seem to come up to this case. Menial servants attending the King must undoubtedly be privileged.

Parke. The defendant was required to attend the Prince Regent on his Majesty's service.

Lord ELLENBOROUGH C. J. That is a different ground; it may perhaps be maintainable on that ground, in the same manner as a person who has been called upon to attend a court of justice is privileged *redeundo*.

Rule *Nisi* on that ground.

Lord ELLENBOROUGH C. J. If it had been within the Tower there could be no doubt but that the arrest would have been wrong.

WHITTINGHAM *against* DE LA RIEU.

1818.

30th Feb.

THIS was an action against the defendant for the recovery of a debt for goods sold and delivered to the defendant. The order for the delivery of the goods was made in *London*, but the delivery itself was partly in *Guernsey* and partly in *London*. The defendant residing in the island of *Guernsey*, and being embarrassed in his money affairs, made a surrender of his property and goods to his creditors, which in that country amounts to a discharge and release of all his debts. The plaintiff entered and proved his debt there. Under these circumstances *Bolland* had previously obtained a rule, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody on filing common bail.

The Court will not discharge the defendant on his filing common bail, unless he make out a clear case to entitle him to such discharge, and the defendant will be left to his plea. *Qy.* How far the *cessio bonorum* discharges a debt contracted in *Guernsey* (a).

Scarlett now shewed cause, and *Bolland*, in support of his rule, cited the case of *Ballantine v. Golding, Cooke's Bank. Laws*, 515. (3d ed. 575.) to shew that what is a discharge of a debt in the country where it was contracted, is a discharge of it every where; and he contended that the defendant had contracted the debt in the island of *Guernsey*, and was accordingly entitled to his discharge here.

SED PER CURIAM. We think it should be pleaded.

(a) It is a rule in the Court of King's Bench, that the Court will not go out of the affidavit, or prejudge the cause, by entering into the merits upon which it is founded. 1 *Salk.* 100. 1 *Tidd*, 6th ed. 195; and 7th ed. 213. *Sed vide* 3 *East*, 169.

1818.

WHITTING-
HAM against
DE LA RIEU.

Scarlett. It was so done in a case under circumstances somewhat similar to these, where the defendant was discharged of his debts in *Ireland* (a).

Bolland. In that case the debt was contracted in *England*, but here it was in *Guernsey*.

Scarlett. The goods were ordered in *London* and sent to *Guernsey*, and part of the goods were delivered in *London*.

LORD ELLENBOROUGH C. J. It is a question of law, whether the *cessio bonorum* in *Guernsey* is a discharge of the debt, and therefore it should be put on record, and not be decided on affidavit.

Scarlett. It would be so, even if the defendant had obtained his certificate.

Manning, on the same side with *Bolland*, cited *Ballantine v. Golding, Co.* Bankrupt Laws, 3 ed. 575; *Potter v. Brown*, 5 East, 124, and the cases there collected; and he contended, that as the defendant was absolutely discharged from his debts by the laws of the Island of *Guernsey*, he might be discharged out of custody on his affidavit of the facts, without being compelled to put them on record.

ABBOTT J. We cannot decide this by affidavit.

HOLROYD J. I should doubt whether the law of *Guernsey* would permit the discharge of the debt which was contracted in *England*, as this appears to be. *Et per Curiam*, it must be put on the record and pleaded.

Rule discharged.

(a) *Cooke's Bkpt. Law*, 3rd ed. 575.

EARLIER *against* LANGUISHE.

1814.

27th June.

MARRYAT moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, on affidavits stating that the defendant had become a bankrupt in *Bremen*, and had there obtained a discharge of his person from all imprisonment for debts.

The Court will not discharge the defendant out of custody on filing common bail, on the ground of his having become bankrupt and obtained his certificate in *Bremen*, where the debt was contracted (a).

LORD ELLENBOROUGH C. J. You had better plead it; we cannot so far pay deference to the law of *Bremen* as to suffer it to alter the law of *England*.

BAYLEY J. asked if the debt had been contracted in this country or in *Bremen*.

Marryat. In *Bremen*. If we were to plead it, the defendant must, in the mean time, remain in custody.

PER CURIAM. There are precedents for such pleas. But we cannot grant the present application.

Rule refused.

(a) The Court of King's Bench has refused to discharge a defendant out of custody who was arrested at the suit of a creditor resident here, on the ground that the debt was contracted in a foreign country, in which the defendant had become a bankrupt and obtained his certificate, and the plaintiff might have proved his debt under the commission. The Court observed, that it did not appear that the plaintiff was resident in the foreign country at the time of the bankruptcy; and therefore they would not decide the question in a summary way, but put the defendant to plead that he was discharged by the bankruptcy and certificate. See *Pedder v. M^r Master*, 8 T. R. 609. *Quin v. Keeffe*, 2 Hen. Bl. 553. The plea suggested by the Court was accordingly filed, but the Court held that it was incorrect in point of form, and the matter never came on again. 1 *East*, 12. A discharge under a foreign commission of bankruptcy is no bar to an action for a debt arising in this country. *Smith v. Buchanan*, 1 *East*, 6. See the form of Plea in *Potter v. Brown*, 5 *East*, 124.

ATTACHMENT.

1816.

26th June.

BOSWELL *against* ATKINS.

Where plaintiff sued out an original against the defendant in his wrong name, the præcipe being right, and defendant put in bail in his right name, Court set aside attachment obtained against the sheriff for not bringing in the body, but without costs on either side (a).

COMYN, on a previous day, had obtained a rule to shew cause why an attachment issued against the sheriff, for not bringing in the body of the defendant, should not be set aside. The plaintiff sued out an original against the defendant by a wrong name, though the *præcipe* was right, and the defendant put in bail in his right name. The sheriff being ruled to return the writ, returned *cepi corpus*. The plaintiff not finding bail in the cause in which the writ was issued, sued out an attachment against the sheriff for not bringing in the body. The defendant had filed an affidavit in the cause in the wrong name.

Gaselee now shewed cause.

PER CURIAM. The defendant has followed the plaintiff in his error; and though the plaintiff was wrong in the first instance, the subsequent accidental error of the defendant seems to have put it so far right, as that the attachment should be set aside, without costs on either side.

Rule absolute, without costs on either side.

(a) If a defendant, sued by a wrong name, appear and perfect bail in his right name, without identifying himself as the person sued by the other name, the plaintiff may treat the bail as a nullity, and attach the sheriff. *Rex v. Sheriff of Suffolk*, 4 Taunt. 818.

COULSON *against* GRAHAM.

1814.

12th Feb.

THE parties had entered into a submission to an arbitration, and an award was made against the defendant; but as he did not perform the same, the plaintiff made the submission a rule of Court, and then issued an attachment against him. The Master of the Crown Office reported that the defendant and Mr. Tomlinson, his attorney, were in contempt, and were now in Court to receive judgment.

The report of Master of Crown Office, that a defendant and his attorney are in contempt for not obeying an award and filing a bill, is to be taken as a conviction; and on defendant's being brought up for judgment, the Court will not receive affidavits in denial of the contempt, but only in mitigation of punishment(a).

Taddy moved that the persons in contempt might be permitted to file affidavits, and be heard in their defence. The *Attorney-General* contended that it could not be done.

LORD ELLENBOROUGH C. J. The report of the Master must be taken as a conviction, and we cannot now receive affidavits in denial of the contempt, but we will in mitigation. The affidavit was then read, and parts of it were objected to, as being a denial.

Tindal was then heard for the prosecutor, and cited *Rex v. James Wheeler*, 3 *Burrows' Rep.* 1256.

LORD ELLENBOROUGH C. J. In that case the expressions of indignation were certainly not too strong.

Fined 50*l.*, and committed till paid.

(a) See *Tidd*, 7th ed. 494, 5.

REX *against* ———.

1818.

28th Nov.

THESSEIGER moved for a rule for an attachment against the defendant, for nonpayment of money in pursuance of an *allocatur*, is only a rule nisi when the *allocatur* is founded on an award (b).

The rule for an attachment for nonpayment of

(b) For nonpayment of costs on the Master's *allocatur*, the rule for an

1818.

REX
against

money in pursuance of the master's *allocatur*. The *allocatur* was founded on an award, and the application was made for a rule absolute in the first instance.

PER CURIAM. The motion is grounded on the Master's *allocatur*, but that *allocatur* was made in pursuance of an award. On referring to the Master, we find that a rule *nisi* only can in the first instance be obtained.

Rule *Nisi* granted.

attachment is in general absolute in the first instance. *Tidd's Prac.* 6th ed. 496. *Thomson v. Billingsley*. For nonpayment of money, generally, a rule to shew cause only is in the first instance granted: and even on the Master's *allocatur*, when that is founded on an award, the rule is only a *nisi* at first, *ut supra*. So in C. P., the rule for an attachment is, in general, only a rule to shew cause; but for nonpayment of costs on the Prothonotary's *allocatur*, the rule is absolute in the first instance. *Chaunt v. Smart*, 1 Bos. & Pul. 477. The rule is there said to be, that where an excuse can be offered, an opportunity of shewing cause ought to be given.

REX against SHERIFFS OF LONDON, in a Cause of HOBHOUSE against MIDDLEDITCH.

Attachment against sheriff not set aside on the ground of delay, unless there have been gross laches on the part of the plaintiff to the prejudice of the sheriff (a).

TURTON obtained a rule to shew cause why the attachment which had issued against the late sheriffs of London should not be set aside, on the ground of laches on the part of the plaintiff. The facts stated in the affidavit were, that the writ was returnable the first day of *Michaelmas* Term; that defendant was arrested, and a bail-bond taken; that

(a) Where the rule for an attachment against the Sheriff for not bringing in the body was obtained on the 11th of *February*, and the attachment, which was returnable on the 4th of *May*, was not issued till the day before the return, and in the mean time the defendant became bankrupt on the 19th *March*, by which means the Sheriff lost his opportunity of proving it, under the commission, the attachment was set aside, on the ground of laches. *The King v. The Sheriff of Surrey*, 9 East, 467.

plaintiff did not rule the sheriffs to return the writ until the 26th of *November*, nor move for the attachment in question till the 29th of *January*. That in the interval the defendant and the bail had become insolvent.

HOBHOUSE
against
MIDDLE-
DITCH.

Marryat and *Espinasse* shewed cause, on an affidavit stating that the defendant was not arrested under the plaintiff's writ, but was in custody at the time when it was returnable, and the defendant was detained under it; that believing him to have been in the sheriff's custody, no rule to return the writ was given; that the sheriff took bail during the Term, and let the defendant go at large, and as soon as the plaintiff heard it, *viz.* on the 25th *November*, or the next day, the 26th, he gave a rule to return the writ, on the first day of *Hilary* Term a rule to bring in the body, which expired on the 28th, and the next day the attachment was obtained. It was admitted that the Court had, in some instances, relieved the sheriff, as in *The King v. The Sheriff of Surrey*, 7 Term Rep. 452. *Rex v. Perring*, 3 Bos. & Pul. 151. and *The King v. Sheriff of London*, 1 Taunton's Rep. 111: but in all those cases a long interval had elapsed. In the first of these cases the sheriff returned *cepi corpus* in *Hilary* Term, upon which the plaintiff proceeded no further until *Michaelmas* Term following, and then the bail having become insolvent, and the defendant absconded, this Court thought it unreasonable that the sheriff should be called upon to return the writ after such delay, and held that the attachment must be set aside. In the present case no such laches have intervened. The first rule was taken out the very Term the writ was returnable, and regularly followed up. They contended, therefore, that the rule ought to be discharged. The Court held that in this case there was not such

HOBHOUSE
against
MIDDLE-
DITCH.

laches as ought to prevent the plaintiff from proceeding against the sheriff, and therefore they could not accede to the application.

The rule for setting aside the attachment was accordingly discharged.

ATTORNEY.

Ex parte ROWLE.

1820.

3d Feb.

ADAM moved to admit this gentleman an attorney of the Court, under the following circumstances. In the year 1814 he was articted for five years to Mr. T——, an attorney of the Court, who was then in partnership with another gentleman. He continued to serve Mr. T—— until the autumn of 1817, when that gentleman left the country, and had not since returned. In the mean time the partnership alluded to was dissolved. After Mr. T——'s departure, Mr. Rowle continued to serve in the office of the partner; and as soon as he discovered Mr. T——'s residence abroad, he obtained that gentleman's consent to execute a written agreement, to assign over the articles to his partner; but before the agreement could be executed, ten months had elapsed, during which time Mr. Rowle continued to serve the partner under no articles. After the assignment of his articles, however, to the partner, he served out the remainder of the five years required by the statute 22 Geo. 2. c. 46. s. 15., and the question was, whether the meritorious service of Mr. Rowle with Mr. T——'s partner during the interval of the ten months, dispensed with the provision of the statute which requires that articted clerks must actually serve during the whole term of five years. He referred to *ex parte Fletcher* and *Carter (a)*.

A clerk, in order to be admitted an attorney, must actually serve five years under articles; therefore, where a clerk had served part of his time with a master who had left the country, and before his articles were assigned to another master, an interval of ten months had elapsed, during which he was not serving under any articles, but under the assignment he served the remainder of the time specified; the Court would not allow him to be admitted until he had served out the ten months under new articles.

(a) Sir W. Blk. 734. And see *Ex parte Bunt*, *id.* 764; *Carter's case*, *id.* 957; and *Ex parte Hill*, 7 T. R. 456. *Tidd*, 7th ed. 61.

1820.

Ex parte
ROWLE.

PER CURIAM. The statute is inexorable; and however we might wish it, we cannot admit this gentleman, under the circumstances stated. The statute positively requires that there should be five years actual service under articles. This gentleman has not served five years within the meaning of the act. He must have new articles to serve so much time as has not been^{*} served under the articles to Mr. T——, so as to complete the five years. As soon as he complies with this requisition he can be admitted.

Admission refused.

1815.

7th Nov.

ANONYMOUS.

A rule *nisi* only granted to discharge an articulated clerk, where the attorney had become bankrupt and absconded, and the rule should be served at the last place of abode of the clerk to the commission, and stuck up in the King's Bench office (a).

A. MOORE moved that the clerk of an attorney might be discharged from his articles of clerkship. He grounded his motion on an affidavit, that the attorney had become a bankrupt and had absconded to foreign parts, and failed to surrender himself under the commission of bankruptcy issued against him.

LE BLANC J. said, that it must be a rule *nisi* only, in order to give the party an opportunity of answering the other's affidavit; but doubting where it could be served, he directed that it should be at the last place of abode of the clerk to the commission of bankruptcy, and that it should also be stuck up in the King's Bench Office.

Rule *Nisi*.

And on a similar motion by *Richardson*, BAYLEY J. directed him to supply himself with a proper affidavit of the service at a proper place, upon his motion to make the rule absolute.

ATKINS against ———.

1817.

6th May.

ANDREWS shewed cause against a rule obtained by *Lawes*, to set aside the proceedings in this action, on the ground that the defendant, who was an attorney, had been sued by common process, plaintiff being also himself an attorney. In answer to the rule, it was said the defendant had given a bill of exchange, and that he had thereby waived his privilege. But per

An attorney must be sued by bill, although he has given a bill of exchange; and plaintiff being an attorney, Court set aside the proceedings with costs (a).

DAMPIER J. The law is clearly otherwise, and has been so settled. The rule must therefore be absolute for setting aside the proceedings, with costs.

(a) Attorney must be sued by bill, even as the acceptor of a bill of exchange, *Comerford v. Price*, *Doughl. 312*, though not when he is liable in *autre droit*, as executor or administrator. *Newton v. Roland*, 1 Lord Raym. 533.

LEE, *Gent. one*, &c. against WILSON.

1820.

12th Feb.

THIS was a rule, calling on the plaintiff to shew cause why it should not be referred to the Master to tax his bill of costs after he had brought an action thereon, and recovered a verdict for 250*l.*, and after the defendant had an opportunity of defending the action.

An attorney's bill may be referred to the Master for taxation, after an action had been brought upon it, and a verdict recovered, on a suggestion that some of the items of the bill would not have been allowed by the Master had it been originally

Scarlett and *Littledale* now shewed cause against the rule, and contended that this application was not only too late, but quite unheard of before. The plain-

referred to him for taxation; but upon the terms of the defendant paying the costs of the application, the costs of the taxation, and the costs of the cause as between attorney and client, the plaintiff being at liberty to take out the money forthwith, which had been paid into Court (b).

(b) It is laid down to be a general rule, that an attorney's bill cannot be taxed after verdict. *Tidd*, 7th ed. 96.

1815.

**LEE, Gent.
one, &c.
against
WILSON.**

tiff had brought his action after a compliance with the statute, by delivering his bill one month before he commenced proceedings. The defendant had appeared to the action, and made a defence at the trial. The jury had found their verdict for the plaintiff for 250*l.*, after which the defendant might have moved for a new trial if he thought injustice had been done him, but no such course was adopted; and now after trial he came to the Court to have the very bill which was the subject of the action, taxed by the Master. This was a most monstrous proposition, and imposed upon the plaintiff the most grievous hardship. The defendant in being allowed to adopt this course of proceeding had a double advantage; first, he had the chance of nonsuiting the plaintiff at the trial, and then, after verdict, of getting those damages reduced by the Master, which the jury had given by their verdict. Suppose the plaintiff had been nonsuited, was it likely the defendant would have moved to have the plaintiff's bill taxed? It was to be hoped therefore, that the Court would not now establish a precedent so extremely dangerous in its consequences. In a late case in the Court of Exchequer it was holden, that a party having once had an opportunity of taxing an attorney's bill, he shall not afterwards take the chance of benefiting by his own omission. There were several cases in this Court, in which it was laid down, that where a defendant had once the opportunity of having his case fairly tried, the Court would not give him the chance of another trial. Such was the present case; and the effect of the present motion would be to grant the defendant a new trial after he had taken the sense of the jury upon his case, and after he had omitted to apply for a new trial within the time prescribed by the rules of the Court. No instance could be cited where an attorney's bill had been taxed after trial, in order to

enable the defendant to take advantage of any omission in the defence set up.

1815.

LEE, *Gent. one,*
&c. against
WILSON.

Campbell in support of the rule, admitted that this was certainly a novel application; but he submitted that in the case of an attorney's bill, the items whereof the jury could not be competent judges, the Court would interpose for the benefit of the defendant in this manner, if they saw that manifest injustice was done by the course taken at the trial. Now here the defendant complained that a considerable portion of the plaintiff's bill was included in the verdict of the jury, which it was obvious that the Master would not have allowed on taxation. This application was made meritoriously, because the defendant had paid the whole amount of the damages into Court, together with 100*l.* for costs.

ABBOTT C. J. The bill of an attorney is the only thing, of which the propriety of the charges is not made the subject of inquiry at *nisi prius*. This is undoubtedly a novel application; but I think we may venture to make the rule absolute, on such terms as will prevent the case from being adduced hereafter as a precedent. The sum recovered is 250*l.* and that, together with 100*l.* for costs, has been paid into Court. We propose that the rule should be made absolute, the defendant undertaking to pay the costs of this application, the costs of the taxation, and the costs of the present cause, as between attorney and client, and not as between party and party; and if this be not done within a certain time after taxation, (to be settled by the Master) the plaintiff shall be at liberty to sign judgment. By imposing these terms, I think it is not likely that we shall have this precedent quoted hereafter. The defence set up at the trial was certainly not a very gracious one. It may be proper to add,

1815. that the plaintiff, in all events, shall be at liberty to take the money out of Court.

LEE, *Genl. one,*
&c. against
 WILSON.

PER CURIAM (*a*).

Rule absolute.

(*a*) *Best J.* was absent.

1813.

ANONYMOUS.

20th May.

In a motion for a rule *nisi* for an attachment against an attorney for not delivering a bill of costs, the affidavit must swear to personal service of the rule (*a*).

STARKIE moved for a rule to shew cause why an attachment should not issue against an attorney for not delivering his bill of costs, pursuant to a judge's order for that purpose. The order had been made a rule of Court, but it did not appear that it had been personally served.

LE BLANC J. said, that unless an affidavit was produced of the personal service of the rule, he could not grant even a rule *nisi* for an attachment.

Rule refused accordingly.

(*a*) If an attorney refuse to deliver a signed bill to his client, the latter may compel him by taking out a summons before a judge, entitled in one of the causes in which he was concerned; and in the King's Bench, if the attorney, on being served therewith, do not attend, an order will be made for delivering it within a reasonable time. 1 *Tidd*, 326, 6th ed. 7th ed. 99. In the Common Pleas, three summonses are necessary, in case of non-attendance, before an order can be obtained. *Imp. C. P.* 574. And in either Court, if the attorney still neglect to deliver it, the order *should be made a rule of Court, and on being personally served (ut supra)*, and making affidavit thereof, the Court on motion will grant an attachment.

1817.

6th Feb.

— against BARTON, one, &c.

Attachment for not paying over surplus money when rule has

LAWEES moved for a rule to shew cause why an attachment should not be issued against the defendant for not paying the balance due to his client until the costs have been taxed, though the balance is admitted, and though it is agreed to dispense with taxation (*a*).

(*a*) Courts will, under special circumstances, refer an attorney's bill to

dant, an attorney, for the non-payment of a sum of money which the plaintiff claimed as being an over-payment made to the attorney beyond his bill of costs (as indeed was admitted by the latter). Defendant having delivered in his bill, the plaintiff served on him a summons to shew cause why it should not be taxed, and the judge made an order thereon; but before the time arrived for taxing the bill of costs, it was agreed between both parties that the taxation should be dispensed with.

1817.

against
BARTON,
one, &c.

ABBOTT J. refused the rule; and held, that as the costs had not been taxed, no rule for an attachment could be obtained, though even upon the agreement of the parties to abandon the taxation, inasmuch as the consequence would be, that after the costs were taxed, the party would be coming again for another attachment. It was therefore incumbent on the party who had obtained the rule for taxing the costs to follow it up by procuring a taxation, and then, and not before, an attachment might be granted.

PER CURIAM.

Rule refused.

be taxed, although the costs have been settled and paid. *Dougl.* 189, 1st ed. *Sayer's Costs*, 323. *Gower v. Popkin*, 2 *Stark.* 85. But an action cannot be maintained for the surplus, where the payment has been voluntary. *Gower v. Popkin*, 2 *Stark.* 85. By 2 *Geo.* 2. c. 23. s. 23. it is enacted, that if, upon the taxation and settlement, it shall be found that the attorney or solicitor shall happen to have been overpaid, then in such case the said attorney or solicitor respectively shall forthwith refund and pay to the party entitled thereto, or to any person by him authorized to receive the same, if present at the settling thereof, or otherwise unto such other person or persons, or in such manner as the respective Courts shall direct, all such money as the officer shall certify to have been overpaid; and in default thereof, the said attorney or solicitor respectively shall in like manner be liable to an attachment or process of contempt, or to such other proceedings, at the election of the parties, as he would have been subject to if the act had not been made.

1822.

*DE WOOLFE and others, against**Trinity Term.*

A summary application may be supported against an attorney to compel him to pay monies entered by him, though he was not employed in any suit. And an agent may make the application, though he has no authority to receive, and the Court will compel the payment into Court for benefit of parties interested (a).

ROCHE moved for a rule to shew cause why an attorney of this Court should not render an account of monies received, and pay the same as the Court should direct: founded on an affidavit, that in April 1809, *De Woolfe*, in *America*, sent over to *England* a power of attorney to the attorney, describing him as counsellor and attorney, and as such to cause to be prosecuted an appeal in the Admiralty in a prize cause. That in consequence of such authority the attorney had employed a proctor, and had received upwards of 3000*l.* and had paid to *De Woolfe* only a small part thereof; and in answer to several applications from *De Woolfe* for an account and payment of the money, had insisted that he could not safely pay the same, inasmuch as *De Woolfe* only acted as agent, and it did not appear that they were sufficiently authorized by the numerous parties interested in the sum recovered to receive the same, and that further documents from those parties were requisite in order to render the attorney secure in paying over the money to any person resident in this country.

The *Solicitor-General* and *Chitty* shewed cause on an affidavit of the attorney, stating that he was not employed as an attorney of this Court in any action, or in his professional character, but as an agent, the same as many merchants were in this country, who acted as agents in prize causes. That he employed a proctor to conduct the prize cause, who received all the fees, in which he the attorney did not participate, but on the contrary, he as usual with other similar agents, charged only a certain per centage on the sum recovered. That he had paid over a considerable sum, and on account of the absence of proper authority from

(a) And see *In re Aithin*, 4 *Bar. & Ald.* 47.

the several parties interested, he could not safely pay over the whole of the money received ; and that he had informed the plaintiff's agent that further documents were requisite. It was contended, that in this case the attorney not having been employed as an attorney of this Court, but merely as an agent, the Court would not interfere in such a summary manner to compel an account and payment, which were more properly the subject of a bill in equity, or an action. That such a mode of proceeding would tend to deprive attorneys of the advantage of a trial by jury, of which every other subject had the benefit, and called on the attorney to disclose his case on oath when, as the parties interested were abroad, he could not have the corresponding advantage of their being required to state facts on their oaths ; and that this summary mode of investigating accounts would become very burthensome to a Court of Common Law, which was not so well constituted to examine and decide upon the same as a Court of Equity.

1822.

Dr Woolfe
and others,
against

The Court, after in part hearing the arguments, expressed a strong opinion, that in cases of this nature it was incumbent on the Court to interfere, but ordered that the matter should be determined at Chambers ; and afterwards the points were argued at Chambers before

BAYLEY J. who determined, that the attorney should within three weeks bring 3000*l.* into Court and render an account of monies received and disbursed to the Master, who should direct whether any and what sum should be paid by the attorney, and to whom, and on what indemnity or security. That though the doctrine had formerly been, that the Court would not interfere summarily against an attorney unless for something done or omitted in a cause or proceeding in one

1822.

DE WOOLFE
and others,
against

of the Common Law Courts, yet the more recent doctrine established, that whenever a person had been employed in consequence of his being an attorney, though not in an action, the Court would interfere summarily to compel him to do what was right (a). That in this case the power of attorney described the attorney as counsellor and attorney, and it was otherwise manifest that the employers contemplated the party's professional character, and it was therefore proper, especially as they were foreigners, that summary relief should be afforded to them, and that they should not be driven to file a bill in equity.

Rule absolute.

(a) In re *Aitkin*, 4. Bar. & Ald. 47. See *Tidd*, 7th ed. 79, 80, 81, *semb. contra*.

BAIL.

PARKER *against* TURNER, Bart.

1813.

19th May.

GASELEE, on a former day, had obtained a rule calling upon the defendant to shew cause why the sum of money deposited in the sheriff by the defendant, on his arrest, in lieu of bail, and since brought into Court by the sheriff, in pursuance of the statute 43 Geo. 3. c. 46. s. 2. should not be paid out to the plaintiff, the defendant not having put in and perfected bail.

The statute 43 Geo. 3. c. 46. sec. 2. does not controul the discretion of the Court with respect to the time for putting in bail; and therefore where money is paid into Court in lieu of bail, and bail is not put in and perfected in due time, the Court, on an affidavit of merits, will grant further time to the defendant (a).

(a) The 43 Geo. 3. c. 46. s. 2. enacts, that persons arrested upon mesne process, in England or Ireland, shall be allowed, in lieu of giving bail, to deposit in the hands of the sheriff the sum indorsed on the writ, together with 10*l*. to answer the costs; and the sheriff is directed, at or before the return of the writ, to pay into Court the money deposited; and thereupon in case the defendant shall put in and perfect bail in the action, according to the course and practice of the Court, the sum of money deposited shall, by order of the Court, on motion, be repaid to the defendant: but in case the defendant shall not put in and perfect bail, then the sum deposited and paid into Court shall, by order of the Court, be paid out to the plaintiff, who is authorized, if he think fit, to enter a common appearance; such payment to the plaintiff to be made subject to such deductions, if any, from the sum of 10*l*. deposited and paid, as upon taxation may be found reasonable. This statute was made in case of defendants, and not for the benefit of plaintiffs; and therefore the plaintiff is not entitled to receive the money out of Court, if the bail render the defendant instead of justifying; for the surrender of the defendant is considered equivalent to his perfecting bail. *Chadwick v. Battye*, 3 M. and S. 283. *Harford v. Harris*, 4 Taunt. 669. When the plaintiff has made an application for the money to be paid out of Court to him, and that rule is discharged on shewing cause, and the merits of the case are fully discussed, and it appears that the defendant is entitled to the money, the Court of C. P. will grant a rule absolute in the first instance for the money to be paid over to the defendant. *Harford v. Harris*, 4 Taunt. 670.

1815.

STANTON'S
Bail.

condemnation money of the judgment, and the bail to be taken in double the amount of that ; and he said that there was no express case upon the subject, and the

Bail justified.

1820.

12th Feb.

DAVIS *against* FOWLER.

After final judgment is signed, the defendant's bail may put in fresh bail, for the purpose of rendering him. It is not necessary that the defendant should be taken to the judge's chambers for the purpose of rendering him in discharge of his bail, unless he desires it.

AFTER final judgment was signed in this case, the original bail for the defendant put in fresh bail, for the purpose of rendering him, and he was accordingly rendered in their discharge.

Archbold on a former day obtained a rule to shew cause why this proceeding should not be vacated, as being irregular ; because, after final judgment signed, the defendant could not be rendered. He also objected that the defendant was not taken to the judge's chambers to be rendered, but carried by the officer forthwith to gaol under a *committitur*.

Marryat and *Reader*, on shewing cause now, were stopped by the Court.

Archbold was again heard in support of his rule.

ABBOTT C. J. There is nothing irregular in the original bail having rendered the defendant after final judgment was signed, by the substitution of other bail. When I first had the honour of being raised to a judicial situation, I certainly was a good deal surprised at an application made to me to put in fresh bail, for the purpose of rendering the defendant, after final judgment was signed ; but I was informed that such a proceeding was by no means uncommon, and that it could be done, except where a *ca. sa.* had been lodged. In the present case it appears that additional bail had been put in at the desire of the original bail,

in order to relieve themselves, by surrendering the party from the responsibility of continuing any longer liable upon the judgment, which appears to have amounted to 2000*l.*; and I think they were at liberty so to do. It is very reasonable that the bail should have this privilege, because bail may be ill in bed, or unable from a variety of causes, to surrender the defendant. Then as to the second objection; namely, that the defendant was not taken to the judge's chambers for the purpose of being rendered, that is in case of the defendant, instead of being carried through the town in custody. It does not appear that the defendant expressed any desire to go to the judge's chambers, and I see no irregularity in not carrying him there, as a ^{very} matter of course. In all events he is not prejudiced by not having been taken to the judge's chambers. As to the other objection, it is quite clear that no persons will become bail unless they are allowed to protect themselves in this manner.

1820.
 DAVIS
against
 FOWLER.

BAYLEY J. I am of the same opinion. It is not irregular to render a defendant after final judgment, by putting in other bail. This question was under consideration eight or nine years since. I then entertained some doubt as to the regularity of such a proceeding, but I found that such was the practice, and it has been done in many instances since. The plaintiff might have a right to complain of it, but certainly the defendant has none; and indeed, as far as I recollect, it was stated at the time the motion was made, that the plaintiff's attorney consented to the change of bail for the purpose of the render. As to the other objection, nothing can come of it, because it does not appear that the defendant desired to be taken to the judge's chambers.

HOLROYD, J. concurred. (*a*)

Rule discharged, with costs.

(*a*) Best J. was absent. *Vide Barnes, 92.*

M. T. 53 Geo. 3.

PAYNE'S Bail.

Bail who have rendered in their discharge, cannot afterwards justify, so as to release defendant from imprisonment, without entering into a fresh bail piece.

IN this case the defendant had been surrendered in discharge of his bail, and notice was given of bail justifying, one of whom was one of the bail who had surrendered the defendant.

Espinasse objected to him on that ground, that he had entered into no new recognizance.

LE BLANC J. held it to be a good objection, as it was necessary to enter into a fresh recognizance; and there was an end of the first by the surrender, as it then became *functus officii*.

1817.

M. T. 22nd Nov.

ANONYMOUS.

Rule *nisi* granted for an attachment against the sheriff, where the bail was put in by a new attorney without an order for the attorney being changed (*a*).

SELWYN moved for an attachment against the sheriff for not bringing in the body, on the ground that bail had been put in by a new attorney without any order for changing the attorney. He admitted

(a) In note (a) to Rule, *Mich. 6 Geo. 2.* it is said, that though where the sheriff has taken insufficient bail, and the defendant is at large, or hath escaped, and the return of the writ is passed, the sheriff cannot comply with the letter of the rule to bring in the body, yet the intent thereof is, that good bail be put in or the sheriff will be liable to an attachment. *R. K. B. Mich. 6 Geo. 2, note (a), Wolfe v. Collingwood, 1 Wils. 262. 2 Saund. 618, in notes.* Though two notices are given by different attorneys of two different sets of bail, and bail put in by the sheriff have already justified, the defendant is entitled to have his bail justify, and be allowed. *Wheeler v. Rankin, Hil. T. 1819. 1 Chitty's Rep. 81. And per Bayley J.* There are many different persons interested that bail should be put in: the defendant is interested, the bail to the sheriff are interested, and the sheriff himself is interested. In *Haggett v. Argent, 7 Taunt. 47. 2 Marsh. 365,* bail were permitted to appear by their own attorney and justify, defendant having refused to instruct counsel to move that the bail might justify. *And *Gibbs C. J.* said, that though the defendant could not change his attorney without leave of the Court, the sheriff and bail might appear by their own attorney. See *Hill v. Roe, 6 Taunt. 532.* Hence it should seem that it is no ground for an attachment against the sheriff that bail have been put in by a new attorney.

that it was an unusual motion, but referred to 1 *H. Bla.* 233. 543.

1817.

ANONYMOUS.

ABBOTT J. said, that as it was a new motion, he would grant a rule *nisi*.

DUTTON *against* WELSTEAD.

1820.

25th Jan.

WALFORD opposed the justification of one of the bail in this case, on the ground that he was one of the sixty clerks in the Six Clerks' Office, contending that he came within the rule of Court, which declares that no officer of the Court shall become bail, &c. *Sed per*

The sixty sworn clerks of the Six Clerks' Office do not come within the operation of the rule which prohibits the officers of the Court from becoming bail.

HOLROYD J. The bail tendered does not come within the rule of Court referred to. He does not act directly for the suitors of the Court of Chancery. He is a public officer through whose medium the business is transacted. The solicitors of the Court employ him, and not the clients. I therefore think he is competent to become bail.

The bail justified accordingly.

Comyn for the defendant.

ANONYMOUS.

1815.

28th Jan.

WALFORD opposed the justification of bail, on the ground that the action was at the suit of *A.* and *B.* jointly, and the notice of justification and the recognizance of bail were at the suit of *A.* only.

If in an action at the suit of two, bail be put in as in an action at the suit of one only, the bail may be treated as a nullity. Bail rejected, on the ground that his children were in the workhouse, and he would not assign a reason (*a*).

LE BLANC J. You have good grounds for opposing them, and if the action is jointly at the suit of *A.* and

(a) See next case.

1815.
ANONYMOUS. *B.* the bail will be of no use to the defendants, as there will be no bail in that cause (*a*).

It appeared that one of the bail suffered his children to go to the workhouse and would not support them, which the bail stated he did from family reasons, and

LE BLANC J. thought him insufficient in this respect, as he stated no reasons for not supporting his children, and he was therefore rejected.

Bail rejected.

(*a*) In *Holt v. Frank*, and another, 1 *M. & S.* 299, the action was brought against two persons conjointly, but the recognizance of bail was drawn up by mistake in an action against one only; and the plaintiff having sued out two writs of *scire facias*, to which *nihil* was returned, signed judgment against the bail, and took out execution, but the Court set aside the judgment and execution for irregularity.

1820.

12th July.

HOLM against BOOTH.

Bail rejected for suffering his father to receive parish relief (*a*).

FROM the affidavits in opposition to one of the bail in this case, it appeared that his father, a very aged man, was receiving parochial relief; and although the bail himself appeared to be in solvent circumstances,

BEST J. would not permit him to justify, because of his suffering his father to depend on parish aid.

Bail rejected.

Reader for the plaintiff, and *Chitty* for the defendant.

(*a*) See the last case, *S. P.*

1820.

3rd Feb.

BUTLER'S BAIL.

Bail having been recently bankrupt, not permitted to justify, although worth 500*l.* at the time he offered to become bail.

ONE of the bail in this case, on coming up to justify, having admitted that he had been a bank-

rupt two months since, and obtained his certificate on the 28th *December* last, but swore that he had since acquired property by the bounty of his friends to the amount of 500*l*.

1820.

BUTLER'S
Bail.

HOLROYD J. said he would not permit him to justify, having been so recently a bankrupt.

Bail rejected.

BARNESDALL *against* STRETTON.

1820.

24th Jan.

ONE of the bail for the defendant in this case, on coming up to justify, was opposed on the ground that his name was indorsed to an outstanding dishonoured bill of exchange, for which he was liable to the holder. The bail stated that he had drawn a bill upon one *Leach*, which the latter accepted, but dishonoured when it became due; that the holder had given him notice of the dishonour, yet he expected indulgence, and had not been sued; but he could not swear that the holder had agreed to wait whilst he proceeded in an action still depending against the acceptor.

A person liable upon ~~outstand-~~
ing dishonoured bills not renewed, or the right of proceeding against him, not suspended, cannot justify as bail.

BAYLEY J. rejected the bail, and said, that as long as a man's name remained on unpaid securities for money, for which he was liable, he ought not to become bail. It should be understood as a general rule, that so long as there are outstanding dishonoured bills not renewed, nor the right of proceeding suspended, a person liable to an action every moment on such securities, should not be allowed to come under new engagements by becoming bail, when he had not discharged those already subsisting.

Bail rejected.

Reader for the plaintiff, and *Andrews* for the defendant.

1820.

12th Feb.

TUDOR *against* SIMPKIN.

It seems, that when the Court orders bail to submit their property to inspection, in order to ascertain its sufficiency to enable them to justify, the plaintiff may cause it to be appraised by a broker.

THE COURT having on a former day ordered one of the bail in this case, (the sufficiency of whose circumstances was doubted) to submit his supposed property to inspection, in order to ascertain its value, the attorney's clerk, accompanied by a broker, went to his house for that purpose. The defendant's attorney being present when the clerk and the broker arrived, refused to permit the latter to see the property, but accompanied the former over the house.

Andrews now opposed the bail, and objected that the plaintiff had not had a sufficient opportunity of ascertaining his sufficiency, for the bail was bound to submit his property to the appraisement of a broker, it being reasonable to suppose that the attorney's clerk was an inadequate judge of its value.

Reader for the defendant contended, that it was a proposition not to be tolerated, that the bail was bound to submit to the domiciliary visit of a broker in such a case as this; it was quite sufficient that he submitted his property to the inspection of the attorney's clerk, the object of the order for inspection being merely that the plaintiff should have reasonable satisfaction that the bail was of sufficient substance to justify.

BEST J. however, said there could be no objection to a broker being called in to appraise the property of a bail, who was suspected not to have sufficient property to answer the engagement into which he entered. The mere inspection by the clerk might be tantamount to no inspection at all, for he might not be competent to form a judgment of the value of the property when he saw it. He desired it, therefore, to

be understood, in future, that where the Court orders the bail to submit his property to view, the plaintiff may cause an appraisement to be made by a broker.

1820.

TUDOR
against
SIMPSON

The bail, not being able to satisfy the Court of his sufficiency, was rejected.

ANONYMOUS.

1817.

21st June.

ESPINASSE moved to justify bail. The writ and declaration were both against the defendant in a wrong name, and the defendant in the notice of bail put in, was named in the right name, "sued by" the wrong name, but in the bail-piece, was called by the wrong name.

Where the notice of bail being put in named the defendant in the right name, "sued by" the wrong name, and the bail-piece called him by the wrong name only, held sufficient.

HOLROYD J. thought, that as plaintiff had declared in the wrong name, and there could be no mistake as to the identity, it was sufficient.

KING's Bail.

Hil. 55 Geo. 3.

READER objected to the notice of bail. The bail was described generally as of *Battle Bridge*.

Bail described as of *Battle-bridge*, in notice of bail, insufficient.

LE BLANC J. held the description too general.
Bail rejected.

ATKINSON *against* THOMPSON.

1813.

20th Nov.

HULLOCK stated on affidavit, that notice of bail had been stuck up in the King's Bench Office, and that repeated attempts had been made to serve it at the attorney's office, and at last, it was put under the door.

Service of notice of bail, by sticking up a copy in King's Bench office, and by putting another under door of attorney, sufficient, if he cannot be personally seen.

DAMPIER J. said, that this was sufficient, for as much had been done as was practicable.

1815.

24th Jan.

Service of notice of bail, by leaving same at a stationer's where the plaintiff's attorney's papers are usually left, is sufficient.

ANONYMOUS.

THE affidavit of service of the notice of bail stated, that the notice was served at a law stationer's where the plaintiff's attorney usually had papers left for him, and

LE BLANC J. said, that if the house in question was his usual place of resort, service at that place would be good.

STORY'S Case. *Ex Relatione* MAG. FOSTER.

Where no bail is put in at expiration of rule to bring in body, bail afterwards put in are bound to justify within four days in town cause, or six days in country cause, without being excepted to.

IF the rule to bring in the body expires, (the Sheriff having returned *cepi corpus*), and no bail is found to be put in, bail, if afterwards put in, are bound to justify within four days in a town cause, or six days in a country cause, without any exception. For if the plaintiff excepted, the defendant would have four days after exception to perfect his bail, and by that means, the defendant would have more than the time allowed by practice to bring in the body.

1815.

30th June.

An affidavit for further time to justify, on the ground that bail cannot attend, must state the consent of the party to become bail^(a).

HAMILTON against DAINSFORD.

APPPLICATION was made for further time to justify bail, upon an affidavit stating that one of the persons put in as bail could not attend, together with the excuse for his not attending. The affidavit, however, did not state that the party had consented to become bail.

BAYLEY J. It is always expected, that the affidavit should in these cases state the consent of the party to become bail, and the belief that if he could have attended, he would have been able to justify as good bail. That should be added to the affidavit.

(a) R. M. 36 Geo. 3. K. B. *Ante*, 1 Vol. 292. *Tidd*, 7th ed. 297.

RENNELL *against* ATKINS.

1813.

20th Nov.

DAMPIER J. refused to allow any time so that notice of bail should be amended; and observed, that any indulgence of this sort would only increase the number of mistakes.

Time to amend errors in notice of bail, not allowed (a).

(a) It is now the practice not to grant ~~time~~ in these cases, unless an affidavit of a defence on the merits be produced.

TOMLINSON *against* HARVEY.

1815.

M. T. 20th Nov.

DAMPIER J. on a former day had allowed time to justify bail, on the ground that the clerk of the defendant's attorney had forgotten to bring down the bail-piece; and this being the day for justification, and the attorney having rectified the mistake, *Adolphus* moved to justify bail, and

A judge will not interfere with another judge's order for time.

Walford contended against the allowance of time; but

Per LE BLANC J. I am not at liberty to set aside Mr. J. DAMPIER's order for time, and if I were, I should affirm it.

The bail accordingly justified.

DONALDSON'S BAIL.

1815.

1st Feb.

DEACON moved to justify bail, three days time having been given to justify, on account of the affidavit wanting a title. *Deacon* stated, that the rule for further time was drawn up by mistake on the *Monday* instead of *Tuesday* as the third day, so that the three days had expired before this day; but the service was made on the *Tuesday*, and the notice to justify to-day.

A rule for further time to justify bail, drawn up as of a wrong day, where immaterial.

BAYLEY J. held it an immaterial error, and suffered the bail to justify.

1818.

16th Nov.

FREEMAN *against* OLDHAM.

Defendant may put in fresh bail when time has been granted to plaintiff, to inquire into the sufficiency of the former.

BAIL answering doubtfully on *Saturday*, time was granted, on the application of the plaintiff, to enquire as to those facts. The defendant now applied to add another bail.

Chitty objected, that time was only allowed to plaintiff to enquire as to the facts sworn to on *Saturday*.

BAYLEY J. said that the defendant ought to be at liberty to put in another bail, upon the plaintiff's applying for time to enquire.

1815.

7th June.

PARTRIDGE *against* ROSE, in *Exchequer*.

A clerk in Court in the Exchequer must sign all proceedings, and not an attorney or agent. A notice to justify bail on an equity day is bad.

THE clerk in Court must sign all the proceedings in the Exchequer, and it is not sufficient that it should be done by the attorney or agent: and a notice to justify bail on a day on which the Court sits in equity, was held to be a bad notice.

1818.

Mich. T.

ANONYMOUS.

Notice of justification of bail on mesne process, added in vacation, need not be given within four days; *aliter* as to bail in error, for they cannot be changed (*a*).

TWO persons had been put in as bail, and notice of their justification given in vacation time, and process, added in vacation, need not be given within four days; *aliter* as to bail in error, for they cannot be changed (*a*).

(*a*). In *Mills v. King*, 9 *East*, 434, the general rule is said to be, that where bail above have been put in, and an exception entered in vacation, notice of justification for the first day of the next Term must be given within four days after such exception. And see *Tidd's Practice*, 6th ed. 265, 6. The principle with respect to bail in error, and bail on mesne process, is different. As to bail in error, the defendant in error is allowed twenty days to except against the bail put in; and the mode of exception is by serving the plaintiff in error with a rule for better bail. The terms of the rule are, that "unless the plaintiff in error puts in better

the defendant's attorney entered an exception to them, and thereupon two others were added in *July*; but the notice of adding and justifying was not given till a day or two before this ensuing *Michaelmas Term*.

1813.
ANONYMOUS.

Adam now objected to their justifying, on the ground that the notice of justification was not given in time, and that it should have been within the four days after the exception: and

DAMPIER J. on referring to the Master, intimated that they could not justify: but

Reader suggested that they were not bail in error, and that the distinction was taken, that bail in error could not be changed, but that bail on mesne process could.

DAMPIER J. referring again to the Master, said they might justify, and that they were added bail, and that the rule limiting the time for giving notice of justification did not apply to them.

bail within four days, execution will issue." The object of the rule is, that execution should not be delayed, unless security is given for the debt. In this case the party has no bail to the sheriff, as on mesne process; he has not any security whatever, except the bail in error. Therefore where the plaintiff in error, within four days after being ruled to put in better bail, viz. on the day after *Hilary Term*, gave notice that he should justify the same bail on the first day of the ensuing Term, and two days before the first day of that Term gave notice of fresh bail, it was held that the latter bail were not entitled to justify, there being no reason assigned for the non attendance of the former bail. *Lusk v Leonard*, 1 M. & S. 366. For if such a practice as this were to prevail, the defendant in error would remain from the end of one Term to the beginning of the next, with merely nominal security, whereas the meaning of the rule for better bail is, that the party shall put in such better bail as he will abide by, unless indeed they are prevented from justifying by special circumstances, which must be disclosed by affidavit at the time appointed for justifying. The Court, however, in determining this case, were careful in distinguishing it from the case of bail on mesne process.

1816.

16th Nov.

ANONYMOUS.

It is no objection to the notice of justification, that it stated that two were added bail, when in point of fact, only one was added.

ESPINASSE, in moving to justify bail, was opposed, on the ground that the notice of justification stated that two were added bail, when, in point of fact, only one was added, the other being one of the original bail.

HOLROYD J. overruled the objection, being of opinion that the notice was correct in substance; but that if the plaintiffs thought otherwise, they must move to set it aside.

(c) N. B. Merchants made the same objection on a following day in the same Term, before Bayley, J. who also overruled it.

1815.

17th Feb.

ANONYMOUS.

The plaintiff and defendant's names in the notice of justification of bail being transposed, is not a ground of rejecting the bail.

ADOLPHUS opposed the justification of bail, and objected that in the notice of justification the plaintiff and defendant's names were transposed: but

BAYLEY J. held this immaterial.

1815.

1st Feb.

ATKINSON'S BAIL.

Time allowed to justify bail where the notice of justification did not state the addition of the bail, but described him contrary to the fact, as bail of whom notice had before been given, on condition that the defendant should produce an affidavit that the error was accidental.

LAWES moved to justify bail, and

Adolphus opposed the justification of one, on the ground that the notice of justification did not contain any description of his residence, but described him only as bail of whom notice of justification had before been given, which was not in fact the case.

Time allowed to justify bail where the notice of justification did not state the addition of the bail, but described him contrary to the fact, as bail of whom notice had before been given, on condition that the defendant should produce an affidavit that the error was accidental.

BAYLEY J. allowed time to justify, on condition that the defendant produced an affidavit to explain it as a mistake (*a*).

1816.

ATKINSON'S
Bail.

(*a*) *Tidd*. 265. And see 2 *Taunt*. 263.

ANONYMOUS.

1816.

M. T. 16th Nov.

ANDREWS opposed the justification of bail, on the ground that the notice of justification was served by one, and the affidavit of the service thereof was made by another attorney for the defendant; and he supported his motion on an affidavit that there was no rule to change the attorney; and

Bail rejected, where the notice of justification, and the affidavit of notice, were served by different attorneys, without a rule to change the attorney.

THE COURT, upon the above facts, rejected the bail.

THOMPSON'S BAIL.

1815.

7th Feb.

LAWE, F. moved to justify bail, on an affidavit that the service of the notice of justification was made at the plaintiff's attorney's chambers, being the Old City Chambers, at seven o'clock in the evening, when the attorney and his clerk being gone, it was left with a person who said that he was in the habit of receiving papers for the attorney, according to his directions (*b*), that an application was again made at the same place on a subsequent day, to enquire if the notice had been received, and the attorney and his clerk were again out of the way, though it was seven o'clock.

If an attorney be not at chambers in office hours, service on a person with whom the attorney's papers are directed to be left is sufficient.

LE BLANC J. It is sufficient service; if they were not at chambers at office hours, they must take the consequences.

(*b*) It must be sworn that the defendant believes the information given was true.

1815.

FREEMAN'S BAIL.

5th April.

Service of the notice of justification of bail on the master of a house, in which the attorney had an office, is not sufficient, unless some privity be shewn to exist between them.

LAWES, E. moved to justify bail, on an affidavit that the notice of justification had been served on the master of a house in the city, in which the attorney had his office.

DAMPIER J.[§] It is not sufficient service; for in the offices in the city it frequently happens that the master of the house knows nothing of the person who holds the office therein, whether he is a stockbroker, attorney, or any other. Some privity must be shewn to exist between them.

1816.

ANONYMOUS.

9th Nov.

Service of the notice of justification of bail after ten o'clock, is bad, though the person on whom the notice was served read it.

TINDAL moved to justify bail. It appeared that the notice of justification had been served after ten o'clock in the evening; but the person on whom it was served having read the notice, and got from it all the information that was necessary, then returned it, saying it was past ten o'clock; and this, *Tindal* contended, was good service.

HOLROYD J. referred to the rule of Court, by which it appeared that the service was void; and he added that the person might have looked at the paper to see what it was (*a*).

^a) The same point was ruled, even though the notice had been retained. *Mich. T. 1814.*

1814.

27th June.

ANONYMOUS.

MARRYAT, in moving that bail might justify, mentioned the circumstances attending the service of notice of justification. The plaintiff was an attorney, and his residence not being discoverable, the notice of justification had been stuck up for him in the King's Bench Office, and it was insisted that this was a sufficient service under these circumstances.

Notice of justification stuck up in the King's Bench Office for the plaintiff, an attorney, who had no known place of residence or business, is sufficient (a).

DAMPIER J., under the particular circumstances of the case, allowed it; and said that the plaintiff should have some place to receive notices.

(a) By a rule of the Court of K. B. a book is required to be kept at the Master's Office, in King's Bench Walk, for the purpose of being inspected by any attorney or his clerk, without fee or reward; and every attorney practising in this Court, and residing in *London* or *Westminster*, or within ten miles thereof, is required to enter in the book, in alphabetical order, his name and place of abode, or some other proper place within the cities of *London* or *Westminster* where he may be served with notices, summonses, orders, and rules. And it is thereby required, that every attorney afterwards to be admitted, and practising or residing as aforesaid, shall, upon his admission, make the like entry; and that as often as any such attorney shall change his place of abode, or the place where he may be so served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book; and that all notices, summonses, &c. which do not require a personal service, shall be deemed sufficiently served on such attorney if a copy thereof shall be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order, and rule for such attorney, in the said Master's office, shall be deemed a sufficient service, unless the matter be such as shall require a personal service.

— against **CLARKE**.

1820.

12th Feb.

IN this case four notices of justifying bail on behalf of the defendant, at chambers, had been given to the Court has no power to order the payment of costs of vexatious notices of justifying bail at chambers, before the defendant is permitted to give a fresh notice, where there has been a change of the defendant's attorney. It seems to be otherwise, where the same attorney has acted vexatiously in giving repeated notices (b).

(b) See the rule of Court, 5 *Bur.* and *Ald.* and *ante*, 1 Vol. 44 and 80.

1820.

 against
CLARKE.

the plaintiff's attorney, for four different days ; but the bail never attended. The plaintiff had been put to considerable expense in making inquiries after the sufficiency of the bail, and counsel had been instructed on each day to oppose their justification.

Holt now moved for an order to restrain the defendant from giving a fresh notice of justification, until he had paid the costs of the former notices. He complained of the hardship of the plaintiff's case, in being thus exposed to infinite trouble and expence, in consequence of the defendant's vexatious conduct ; but he admitted that the previous notices of justification had not been given by the same attorney.

ABBOTT C. J. The Court has long been sensible of the great vexation that arises to plaintiffs, from allowing defendants to justify bail before a judge at chambers ; and I am quite persuaded, that if the legislature had been aware at the time the act of parliament passed, which authorizes the justification of bail at chambers, of the enormous vexation to which this practice exposes the suitors of the Court, they would never have given it their sanction. I regret extremely that it is not in our power to entertain this application. If all the notices had been given by the same attorney, probably we should come to a different result ; but we cannot interfere as the case is now presented to us.

PER CURIAM.

Refused.

1816.

 26th Nov.

MANDORF'S *Bail*.

One of the bail may be taken by affidavit before a commissioner in the county, and the other before a commissioner in town.

PARKE, J. opposed the justification of bail by affidavit, objecting that one of the bail was taken before a commissioner in the country, and the

other before a commissioner in town ; and he referred to a case in the Common Pleas, in 1786.

1816.

MANDORF'S
Bail.

But BAYLEY J. thought it was no objection, as it would be a very hard rule if it required the two bail to be together, either in *London* or in the country.

Objection overruled.

ANONYMOUS.

1816.

22nd Nov.

AN objection was taken to the justification of the bail by affidavit, on the ground that the bail had been taken before two different commissioners, the stat. 4 *W. & M. c. 4. s. 2.* requiring them to be taken before the *said* commissioner, which he contended meant, before the *same* commissioner.

It is not necessary that in bail by affidavit both bail should justify before the same commissioners.

HOLROYD J., on referring to the statute, overruled the objection, stating that he thought the word *said* referred to the species of commissioner, and not to the particular individual, and that it meant *such* commissioners as are described in the first section.

E. Lawes stated to the Court that he had, some time since, made the same objection before Mr. J. BAYLEY, who overruled it on the same ground.

Objection overruled.

BREALEY *against* HOLT.

1814.

17th Nov.

JUSTIFICATION by affidavit.—*E. Lawes* objected that the affidavit of justification was not made before the same commissioner as the affidavit of *taking* the bail ; and this was contended to be necessary by the statute 4 and 5 *W. and M. c. 4. s. 2.* which enacts, that when the bail do not live within the cities

In bail by affidavit, the affidavit of justification need not be sworn before the same commissioner as that before whom the affidavit of taking bail was sworn.

1814.

BREALEY
against
HOLT.

of *London or Westminster*, or within ten miles thereof, the bail shall not be compelled to appear in person in any of the said courts to justify themselves, but the same may be determined by affidavit or affidavits duly taken before the *said* commissioners; but

PER BAYLEY J. The word *said* means any of the commissioners.

Objection overruled.

1815.

28th Nov.

The jurat to an affidavit by a marksman, must state that it was understood by him, as well as that it was read over and explained to him.

ALLWORTHY'S *Bail.*

GREY moved for time to justify bail by affidavit, the affidavit being made by a marksman; and the jurat stated, that it was read over and explained to him, yet did not shew that he understood the contents thereof (*a*).

PER CURIAM.

Time allowed.

a. 1 Tidd, 520.

1815.

28th Nov.

An affidavit by a marksman, must state that the mark was made in the presence of the commissioner.

ANONYMOUS.

SPANKEY moved for time to justify bail by affidavit. One of the bail was a marksman, and the jurat, in his affidavit of justification, did not state that his mark was made in the presence of the commissioner.

THE COURT allowed time to amend.

1815.

7th Feb.

DRABBLE *against* DENHAM.

In bail by affidavit, time allowed where the two deponents names

were not mentioned in the jurat.

CLARKE J. moved for time to justify bail, there being two deponents, and the names of both of them not being in the jurat.

BAYLEY, J. at first refused it peremptorily, saying it was never allowed; and stated that **Mr. Justice DAMPIER** had frequently refused it. But upon referring to the officer of the Court, who said there was no peremptory rule for refusing time in such a case, **BAYLEY J.** granted the motion.

1816.

DRABBLE
against
DENHAM.

CROW *against* **WATSON.**

1809.

Easter Term.

COMYN moved to justify bail.

Espinasse opposed them, on the ground that the defendant had been arrested, but no bail bond taken, and therefore under *Fuller v. Prest*, 7 Term Rep. 109, the bail should not be permitted to justify, as an action was pending against the sheriff for an escape. It however appeared that the writ was of last Term, and the defendant in custody: but

Bail allowed to justify, though no bailbond had been taken, the writ appearing to have been returnable of a prior term. In the case of a prisoner, notice of bail may be given by one attorney, and notice of justification by another.

BAYLEY, J. The case of *Fuller and others v. Prest*, only applies where the writ is of the same Term; and as the rule for the allowance of bail, when produced, would not be an answer to the action for an escape, there is no objection to the bail's justifying.

Espinasse made another objection, that bail had been put in by one attorney, and the notice of justification given by another.

This was held not to be irregular in the case of a prisoner, and the bail justified.

MALPERSON'S Bail.

1811.

Mich. Term.

HELD, that an attorney cannot justify bail put in by another attorney, without changing the attorney; but
ney, time given to change the attorney regularly.

Where bail put in by one attorney attempted to justify by another attorney.

1813.

MALPERSON'S
Bail.

DAMPIER J. upon motion of *Triss*, granted time to change attorney, it appearing to be an accidental informality. *N. B.* There was no affidavit.

1818.

28th April.

The time for justifying bail in the Exchequer is before ten o'clock in the morning.

TOMKINSON'S *Bail. (In Exchequer.)*

D. JONES moved to justify bail in the middle of the day, and

THE COURT said, that though the *dictum* in 2 *Price Exchequer Rep.* 327, relating to the justification of bail at the sitting of the Court, and before the other ordinary business, was not promulgated by the Court as a rule or order of the Court, but only as an intimation of what they intended to make a rule, and though that intention was never carried into effect, yet that the rule seemed so reasonable, that they should refuse the motion.

1814.

5th Feb.

ANONYMOUS.

Bail, though opposed in two actions, must be opposed in each separately.

THE same persons appearing to be bail in two actions, the counsel instructed to oppose them was about to make the exception to them in both actions at the same time; but

THE COURT held, that though counsel have to oppose the same bail in two actions, they can only oppose one set of bail at a time, and must therefore make their oppositions successively in each action.

E. T. 57 *Geo.* 3.SALTER *against* WHITEFIELD.

Husband of defendant, who had married after the arrest and before the return of the writ, allowed to justify as one of the bail

ESPINASSE opposed the justification of bail. At the time of the arrest, defendant was a widow,

and before the return of the writ, allowed to justify as one of the bail

but before the return of the writ she married a Mr. Deacon, who now came up to justify as one of her bail. Opposition was made, on the ground that the husband would be liable in his own person for the debt of his wife, *dum sola*, so that the plaintiff's security would not be bettered.

SALTER
against
WHITEFIELD.

Lawes, contra, urged, that the husband was not as yet a party to the cause, and

ABBOTT J. held, that he was admissible as bail.

Bail justified.

NEWMAN'S *Bail*.

1816.

31st Jan.

IN answer to a question put to one of the bail, he said that he did not know whether he had been arrested or not during the space of two years, and on this account,

Bail who did not know whether he had been arrested or not during the space of two years, rejected.

BAYLEY J. rejected him.

HOBSON'S *Bail*.

1816.

24th May.

IN bail by affidavit, the affidavit stated, that *A.* and *B.* and each of them, were worth double the sum, beyond the debts due to any other person.

An affidavit that *A.* and *B.* and each of them, were worth double the sum sworn to in the affidavit to hold to bail, exclusive of all debts due to any other person, is sufficient.

HOLROYD J. thought this sufficient, each of them being the same as an affidavit of each separately, and that debts due to any other person would include themselves.

1813.*

14th Nov.

Quere, if a beneficial leaseholder is sufficient bail, where he is neither freeholder nor householder.

ANONYMOUS.

ADOLPHUS opposed the justification of bail, on the ground that one of them was not a freeholder or householder. It appeared that the bail, though not a freeholder, was possessed of many beneficial leases for long terms, which he held at pepper-corn rents.

Reader suggested, that BAYLEY J. had held, that long beneficial leases at small rents were sufficient to entitle bail to justify; and this opinion of the learned Judge was also recollected by some other gentlemen at the bar.

LE BLANC J. said, he wished the rule to be settled by the Court one way or other. At present, he thought the rule was that no bail could justify, unless either freeholder or householder; and he did not wish that three or four cases should pass which might serve to establish a different rule, without all the Court should sanction it. In this case, therefore, he allowed the justification of the bail that was not opposed, and granted two days for supplying the place of that bail where property had been objected to as insufficient.

1814.

24th Jan.

A leaseholder for ninety-nine years admitted as bail by consent.

ANONYMOUS.

PULLER moved to justify bail.

Littledale opposed, on the ground that the bail was not a housekeeper, and had only a leasehold estate in *Worcestershire* for ninety-nine years, determinable on three lives.

LE BLANC J. This is insufficient; the only question is, whether the property is a freehold. I can make no distinction between the different sorts of leases, and one lease is for this purpose the same as another.

1814.
ANONYMOUS.

Puller then referred to a case before LE BLANC J. in the last Term (a); but

PER LE BLANC J. In that case the bail was rejected; and I still think the property insufficient.

The bail, however, was afterwards examined by consent; and it being sworn that he was worth the necessary sum, a justification was established on that ground.

(a) See the last case.

ANONYMOUS.

1815.

1st Feb.

POLLOCK moved to justify bail, and

Comyn opposed the justification, on the ground that one of the bail had only copyhold property for life in right of his wife.

A copyhold estate in right of wife is not sufficient property for bail

BAYLEY J. rejected him, but gave time.

JAMESON'S *Bail*.

1815.

1st Feb.

ADOLPHUS opposed the justification of bail, on the ground that one of the bail had been asked by his brother (the attorney for the defendant) to be bail for the defendant, and the bail answered, that he did not know the defendant.

It is no objection to the justification of bail, that he was not acquainted with the defendant.

1815.

PER CURIAM. That is no objection (a).

JAMESON'S
Bail.

(a) In *Tidd's Practice*, 7th ed. 293, it is said, that bail have been rejected who did not know the defendant *Per Cur. M. 26 Geo. 3. K. B.* but that the circumstance of not knowing the defendant being only a matter of suspicion, may be explained away.

1817.

23rd April.

HATFIELD'S *Bail.*

No objection to bail, that he had been transported thirty years ago.

ON an objection being taken to bail, that he had been transported thirty years ago,

ABBOTT J. overruled the objection, and said that the term of transportation having expired, the bail was under no legal disability for this purpose.

1815.

24th Nov.

ANONYMOUS.

It is no objection, that the bail were put in by an uncertificated attorney.

LITTLEDALE opposed the justification of bail, on the ground that they had been put in by an uncertificated attorney.

DAMPIER J. That is no objection; the defendant may not be aware of it, and

Pollock said, that the same objection had been lately overruled in the Common Pleas.

1820.

3rd Feb.

ADDISON *against* FOSTER.

Where counsel was instructed to oppose bail, who were by mistake allowed to pass without opposition, they were ordered to come up again on another day, and the rule for allowance in the mean time stayed.

— was instructed to oppose the justification of bail in this case. When the defendant's bail were called, they were asked whether they came up to justify in this cause, and having answered in the negative, they justified without opposition, under a supposition that there was some other cause of the same names; but it afterwards appearing that the bail justified by mistake, without any default of counsel, the allowance was stayed, and the bail were ordered to come up to justify to-morrow.

NETHERSOLE'S *Bail*.

1813.

24th Nov.

AN objection was taken to the form of rendering of the defendant, on the ground that it could not be made without the attorney in the cause.

A render may be made by the party himself, and without an attorney.

LORD ELLENBOROUGH, C. J. The render may be made without an attorney ; all things to be entered on record must be done by attornies, but the party may render himself.

BAYLEY J. This is a disgraceful attempt to take advantage of a point of practice, against the evident justice of the case.

THE COURT overruled the objection.

THE KING *against* **THE SHERIFF of MIDDLESEX,**
in a Cause of ——— *v.* **FARQUHAR.**

1820.

5th Feb.

AN attachment was issued against the sheriff under the following circumstances : notice of justification of bail having been given, they were opposed by counsel on the day appointed, in the presence of the plaintiff's attorney, and justified themselves in open Court. The defendant's attorney having obtained the rule for allowance, went to the chambers of the plaintiff's attorney at a quarter past nine o'clock the same evening, for the purpose of serving it ; but finding the office shut up, he went away without leaving it in the letter box. Next day at half-past twelve o'clock, he called and left it at the chambers of the plaintiff's attorney. At eleven o'clock on the same day the sheriff was attached for not bringing in the body, and now the de-

The sheriff is liable to an attachment for not bringing in the body, if the rule for the allowance for bail be not served in time, although the bail justified after opposition of counsel, in the presence of the plaintiff's attorney (a).

(a) See *Tidd*, 7th ed., 301.

THE KING
against
THE SHERIFF
OF MIDDLE-
SEX, in a
cause of
against
FARQUHAR.

fendant came to set aside the attachment for irregularity under the circumstances above stated ; but

THE COURT held the attachment to be regular, for it was the duty of the defendant's attorney to have served the rule for the allowance of bail on the evening of the day when the rule was granted, by leaving it at the chambers of the plaintiff's attorney ; and they acted upon the decision of the *King v. the Sheriff of Middlesex (a)*, where it was held that bail is not regularly put in until the allowance of it has been served, even though the plaintiff oppose the justification.

Rule discharged.

Chitty for the plaintiff, and *Archbold* for the defendant.

(a) 4 T. R. 493.

1812.

Trinity Term.

SMITH against LEWIS.

Bail have eight days to surrender the principal ; and where the render was made in due time, Court set aside proceedings against bail, and held that plaintiff was not entitled to costs of writs issued against the bail before notice of render.

ESPINASSE obtained a rule to shew cause why the proceedings in an action against the bail on their recognizance should not be stayed, and why an *exoneretur* should not be entered on the bail piece. The facts were that the *capias ad satisfaciendum* against the principal was returnable the first day of this Term, (29th of May) ; the principal was rendered on the next day, (Saturday, the 30th of May,) but no notice of render was served until five o'clock on Monday evening, June the 1st.

Campbell shewed cause. He admitted that the motion was regular, but contended that he was entitled to the costs of writs issued against the bail, they having issued before notice of render.

Espinasse contended that he was not entitled to any costs, and cited *Byrne v. Aguilar*, 3 *East*, 306.

1812.

 SMITH
against
LEWIS.

THE COURT held that he was not entitled to costs, the bail having eight days to surrender the principal; and that the rule must be made absolute.

Rule absolute accordingly.

HARRIS against GLOSSOP.

1816.

 6th Nov.

TINDAL moved to enlarge the time for the bail to surrender their principal, who was a bankrupt, and he cited 3 *East*, 145. 1 *Taunt.* 320. *Crump v. Taylor*, 1 *Price*, 74.

The Court will not grant a rule to enlarge the time for the bail to render the bankrupt, defendant, unless it be sworn that the application was made by the bail.

BAYLEY J.^c asked if the motion was for the bail or the principal.

Tindal. For the principal.

ABBOTT. J. Were not those cases moved with the consent of the bail?

Tindal. Yes, and so it is here. But it not being so stated in any affidavit,

PER CURIAM. You must get such an affidavit.

Tindal took nothing by his motion.

1814.

Easter Term.

HUTTON against REUBEN and another, Bail of JACOB.

In order to fix bail, the *ca. sa.* must be left four days in the public book in office, and not in the secret book (a).

THIS was a rule to set aside proceedings against the bail for irregularity. After final judgment had been obtained, the plaintiff sued out a *capias ad satisfaciendum* against the principal. It appears that two books are kept in the sheriff's office, where entries are made of the writs of *capias ad satisfaciendum* which have issued against principals. The one a public book, for writs of *capias ad satisfaciendum* to be returned *non est inventus*, and on which no warrant is issued, or proceedings had, and in which book the bail and all other persons may search. The other a private book, from which warrants are made out for actual arrest. A warrant had been made out in the *capias ad satisfaciendum* for an actual arrest in this case, and *non est inventus* returned; and this action was brought against the bail on their recognizance.

Topping and *Lawes* contended that the proceedings were irregular, inasmuch as the bail, before they could be fixed, were entitled to notice by the lodging of a *capias ad satisfaciendum*, of the plaintiff having elected to take an execution against the person of their principal before they were sued, in order that they might render him, whereas the bail had no notice whatever by this mode of lodging the *capias ad satisfaciendum*, which was private and secret.

Pollock, contra, said they had eight days after process served to render the principal.

THE COURT said that the bail ought to have notice, or the means of notice, before action brought; and as the suing out a *capias ad satisfaciendum* as here gave

them no notice, the proceedings were irregular, and the rule must be made absolute.

Rule absolute accordingly.

ANONYMOUS.

1813.

26th May.

READER, on a former day, had obtained a rule to shew cause why the name of one of the bail should not be struck out of the bail piece, on adding and justifying another in his stead. The motion was grounded on an affidavit that the bail already put in would be material in the cause as a witness for the defendant. It was now moved that the added bail might justify, and no cause being shewn to the contrary, the bail justified, and the rule obtained by Reader was made

Bail struck out of bail-piece, on the ground of his being a material witness, and another allowed to justify in his stead *ante*.

Absolute.

(a) An affidavit must be produced of the bail's being a material witness. *Young v. Wood, Barns*, 69 The same practice prevails in C. P. as in this Court.

ANONYMOUS.

23d June.

STAVELEY moved to stay the proceedings on a bail bond, without costs, the assignment of the bail bond being made on the same day that the notice of render was given. It appeared, however, that the notice had not been in fact given till after the bail bond was assigned.

The Court will stay the proceedings on a bail bond without costs, if the notice of render be given before the assignment, otherwise not (b).

PER BAYLEY J. The Court will stay the proceedings on a bail bond, without costs, if the notice of render be given before the assignment, otherwise not (b).

Rule refused.

(b) If the principal be surrendered in time, but the bail omit to give regular notice of it to the plaintiff, in consequence of which he proceeds upon the bail bond, the bail may apply to set aside the proceedings, on payment of costs, even after execution has been levied, and the money is in the sheriff's hands. *Lepine v. Barratt*, 8 Term. Rep. 222.

1815.

18th April.*ANDERSON'S Bail.*

The Court will not enter an *exoneretur* on bail piece, on the ground that the principal was a lunatic, and that the marshal had refused to receive him into his custody.

GURNEY moved on behalf of the bail, that an *exoneretur* might be entered on the bail-piece, on the ground that the principal had become a lunatic during his residence in the rules; and the bail wishing to surrender him to the Marshal, the Marshal said he had no place fit for the reception and security of a person of such a description. Upon which refusal, application was made for his admission into a proper place for lunatics; and *Gurney* said, that such application would, in a few days, prove successful.

LE BLANC J. asked if he could shew any precedent for such a proceeding; and added, that he remembered such a case had been before the Court, and stood over for some time for the consideration of the Court; but it was eventually refused (a).

Motion refused.

(a) See *Cock v. Bell*, 13 East, 355. *Tidd*, 7th ed. 257, 308.

1810.

Mich. T.

*MOORBY against GADGE and HANKIE. Bail of
GADGE.*

Bail may apply to enter an *exoneretur*, if the principal becomes bankrupt at any time before they are actually fixed; and where first *sci. fa.* did not issue till six days after the bankruptcy of the bail, Court set aside the execution which had issued against bail, but with costs to be paid by the bail.

ESPINASSE moved to enter an *exoneretur* on the bail-piece, and set aside an execution issued against the bail, on the ground that the principal had obtained his certificate on the 21st of April, and the first *scire facias* against the bail did not issue until six days after, and that the bail were afterwards fixed and execution issued thereon.

Reader for the plaintiff said, the application came too late, as the bail should in the first instance have applied to have an *exoneretur* entered on the bail piece.

against bail, but with costs to be paid by the bail.

PER CURIAM. The bail may come at any time, if they are not actually fixed when the principal became a bankrupt; but the bail must pay costs.

— *against* **BRUCE.**

1814.

15th June.

SMITH moved for a rule *nisi* to enter an *exoneretur* on the bail-piece, the defendant having been discharged under the Insolvent Debtors' Act; he moved this in analogy to cases on the Alien Act, the bail being prevented by act of parliament from rendering the defendant. He referred to the act 53 Geo. 3. c. 102., whereby he contended that the proceedings in all other Courts were, in fact, stayed by the proceedings in the Insolvent Court, and that if any person thought proper to proceed, he could only proceed upon the recognizance given in the Insolvent Court, and sue out execution thereon, and distribute the produce equally amongst the creditors.

If defendant be discharged under Insolvent Act, the Court will order *exoneretur* on bail-piece (a).

Rule *nisi*, and afterwards,

Rule absolute.

(a) See Cases of Bankruptcy, *Tidd*, 7th ed. 311.

PHILLIPSON *against* **BROWNE.**

1816.

1st May.

PEAKE opposed justification of bail in error, and contended that they ought to justify, not merely in double the sum in the condition of the bond, but in double the sum for which the judgment was entered up, which exceeded half of the amount of the penalty. He referred to the statute, 3 Jac. 1. c. 8. and 3 Car. 1. c. 4.; and cited 2 Stra. 821; 1 Wils. 213.

Bail in error should be for double the sum for which judgment is entered up, b.

(b) In *Tidd*, 7th ed. 1197, it is said to be sufficient in K. B. if the bail justify in double what is really due.

BAYLEY J. after consideration, decided that the bail should be taken in double the sum for which judgment had been entered up.

1817.

T. T. 57 Geo. 3.

——— - *against NICHOLLS, Gent.*

Though a writ of error be allowed, yet if bail in error be not afterwards put in, it will be a nullity, though defendant in error has treated the writ of error as a nullity (a).

ESPINASSE obtained a rule to shew cause why the execution issued in this cause should not be set aside for irregularity, with costs, on the ground of its having issued after service of the rule for the allowance of a writ of error. The rule for the allowance had been served on the 11th of *June*; the motion was made, and the rule obtained on it on the 13th, the execution having issued on the 12th. The affidavits in answer to the rule were sworn on the 16th, and stated that no bail in error had then been put in. It was admitted that the action was one which required bail in error.

Gurney, on shewing cause, insisted that the mere service of the rule for the allowance of a writ of error was not a stay of proceedings, unless bail in error was afterwards duly put in and perfected.

Espinasse answered, that his rule was obtained before the time for putting in bail expired, and that it was with a stay of proceedings; nor could the plaintiff in the action call upon the defendant to put in and perfect bail in error on a writ of error which he had himself treated as a nullity, by suing out execution in despite of it; that it being part of the rule that proceedings should be stayed, all proceedings in the cause were suspended; and that it would be time enough to put in bail in error when the rule was disposed of.

SED PER CURIAM. The proceedings only of the

plaintiff were stayed. It was the duty of the defendant to have gone on regularly, as he affirms the writ of error to be valid. Where the action requires bail in error, the service of the rule is not sufficient, unless bail is put in and perfected. If the action did not require bail, it would be otherwise. Bail here not having been put in, the writ of error is of no avail.

Rule discharged.

1817.

against
NICHOLLS,
Gent.

GWILLIM *against* **HOWES.**

1817.

Mich. T.

ESPINASSE moved for leave to justify one bail, and for two days' time to add and justify another, on an affidavit that the bail was confined to his house, and so ill as to be unable to attend. This was not denied by the other side; but it was said that the cause was removed by *habeas corpus* from the *Marshalsea*, in which case time was never given. *Espinasse* admitted that the practice had formerly been as stated, time having been refused in such a case by the whole Court, when Lord *Kenyon* presided. But he suggested that an alteration had taken place in the practice in this respect, and Mr. *Platt*, the clerk of the papers, said it had been so, and it was confirmed by Mr. *Reader*, as *amicus curiæ*, and that the practice had only been altered in respect to cases where the bail was prevented from attending through illness.

Time granted to add and justify bail by *habeas corpus*, where one of the bail was so ill as to be unable to attend.

ABBOTT J. acquiesced in this distinction, and granted the motion.

PER CURIAM.

Time allowed.

* 1808.

Easter Term.

Rule for staying proceedings on bail-bond may be obtained the same day that the bail justified.

SHAWE *against* JOHNSTON.

WIGLEY obtained a rule to stay proceedings on the bail-bond, upon payment of costs, on an affidavit of the bail having justified. The bail justified on the morning of the 14th of *May*, and the rule in question was obtained on the same day.

Espinasse shewed cause, and contended it was irregular, as the rule for the allowance of bail was not then served, which he contended to be necessary, and that the bail should be perfected before the motion was made, and the rule for allowance should have been served. But,

THE COURT held that the rule to stay proceedings on the bail-bond might be obtained the same day that the bail justified.

1816.

NUNN *against* ROGERS.*H. T.* 56 *Geo.* 3.

Where bail are not put in in time, they must justify without exception; and if not justified, plaintiff *may* take an assignment of, and proceed upon, the bail-bond.

ESPINASSE, on a former day, had obtained a rule to shew cause why the proceedings on the bail-bond should not be set aside, with costs, on the ground of irregularity. The irregularity complained of was, that bail were put in on the 9th of *December*, and no exception was entered until the 5th of *January*, at which time it was contended that the bail had become absolute, not having been excepted to for twenty days.

Casberd shewed for cause, that the writ was returnable the second return of *Michaelmas* Term, and bail were not put in in time, nor until the 9th of *December*.

Espinasse contended that that made no difference,

as the bail were put in for the very purpose of discharging the bail-bond.

BAYLEY J. said, that where bail were not put in in time, the defendant must justify the bail. It was not sufficient that they were put in; for though not expected to, they were bound to justify.

KELLY, Assignee of the Sheriff, against WROTHER.

LAWEES obtained a rule to shew cause why the assignment of the bail-bond in this cause should not be set aside, with costs, for irregularity.

The *Attorney-General* and *Espinasse, contra*, objected that the affidavits were wrong entitled, and that they should have been entitled in the original cause, and 4 Term Rep. 689. was cited. *Lawes*, in support of the rule, contended that they might be entitled either way; and

THE COURT were of that opinion; but it afterwards appeared that the defendant's attorney had given his notice of bail, as put in before Mr. Justice *Grose*, whereas they were put in before Mr. Justice *Le Blanc*, and the Court held that this was a fatal irregularity.

PER CURIAM.

Rule discharged.

(a) *Tidd*, 7th ed. 326. 515.

REX against SALTER, and others.

CAMPBELL moved that the sum for which the recognizances of the defendants and their bail had been taken, upon their obtaining a *certiorari*, charge, the Court will not, on affidavit of aggravating facts, increase the bail.

1816.

NUNN
against
ROGERS.

Affidavits in support of rule to set aside proceedings by assignee of bail-bond, may be entitled in action on bail-bond, or in the original cause (a). Notice given of bail, as put in before one judge, when in fact they were put in before another, is irregular, and the Court will not stay the proceedings on the bail-bond.

1815.

17th April.

After the defendants have been admitted to bail on a criminal

1815.

REX
against
SALTER
and others.

might be increased, on the ground that the facts against them appeared on his affidavit to be of more importance and enormity than had appeared to the Court when they granted the rule for the allowance of bail. The charge against the defendants was for conspiring to defraud the prosecutor and other merchants in the city.

LORD ELLENBOROUGH C. J. said that this had never been done before, and that the bail having been once taken, it could not now be taken in an additional sum.

BAYLEY J. doubted how the defendants, having been once arrested, could be arrested again, which in fact must be done to compel them to give additional bail.

Application refused.

1814.

29th Jan.

THE KING *against* ———.

A motion to bail a defendant for an assault must be made before a judge at chambers.

WALFORD moved to bail a defendant for an assault.

PER CURIAM. That is an application which should be made before a judge at chambers.

Motion refused.

1813.

26th June.

THE KING *against* ———.

Prisoner brought up on a charge of horse-stealing admitted to bail (a).

PULLER moved that a prisoner brought up by *habeas corpus* should be discharged on bail.

(a) The Court, in the exercise of their discretion, will not in general bail in cases of felony; and where a prisoner has been committed for felony, and on being brought up by a *habeas corpus* the warrant appears defective, the Court will, if there appears on the depositions to be a sub-

Abbott, contra. The charge is for horse-stealing. Doubts however arose as to the property of the horse, and it appeared that the defendant had only taken it to ride a short distance, and then turned it loose. The notice of bail was also objected to: but as the defendant was in custody the objection was waived.

The defendant was then bailed, himself in 100*l.* and four sureties in 25*l.* each.

stantial charge, recommit him, notwithstanding the defect. 1 *B. and Ald.* 574, 5. The rules respecting the bailing an *habeas corpus* will be found detailed and explained in 1 *Chitty* on Crim. Law. 129.

1813.

 THE KING
against

BANKRUPT.

1820.

1st Feb.

In the Matter of JOHN JAMES.

The statute does not authorize the Court to receive affidavits to explain the conduct of, and circumstances under which, a person was committed by commissioners of bankrupt for not satisfactorily answering questions put to him touching a bankrupt's estate and effects.

THIS person was brought up by *habeas corpus* from his Majesty's gaol of *Newgate*, having been committed thereto on a warrant of commissioners of bankrupt, for not having satisfactorily answered certain questions when under examination as a witness by the commissioners, touching certain bills of lading alleged to be part of the estate and effects of the bankrupt. On the return to the *habeas corpus* the commissioners' warrant was set out, in which the questions propounded to, and the answers given by the prisoner, were set forth in detail. One of the questions now raised was, whether, under the late act of parliament, the prisoner was at liberty to explain, by affidavits in this Court, in order to his discharge, the answers he had given to the questions administered to him by the commissioners. The other point raised was, whether, supposing such affidavits not to be admissible, the answers of the prisoner, as disclosed upon the return, were not sufficient to induce the Court, in the exercise of its discretion, to discharge him.

Curwood was heard for the prisoner, and *Wilde* for the assignees.

ABBOTT C. J. I have read with considerable attention the questions and answers set forth in the commissioners' warrant, in order to satisfy myself, if pos-

sible, that the prisoner has satisfactorily answered the interrogatories. It appears to me that he has not, and that the commissioners were well warranted in saying that they were not satisfied with the answers, and consequently the prisoner must be remanded. The prisoner may, if he pleases, satisfy the commissioners by other evidence, that there is no ground for the supposition of fraud imputed to him in the questions. It will be competent for him to produce such evidence before the commissioners, but we have no power to make such enquiries; and as it seems to me that the prisoner's answers could not be satisfactory to the minds of reasonable men acquainted with business, he is not entitled to be discharged by us.

1820.

In Re
JOHN JAMES.

BAYLEY J. The answers given by the prisoner to the questions put to him, are by no means satisfactory, and therefore he was properly committed. He may apply to the commissioners, or he may petition the Lord Chancellor, in order that he may be again allowed to give more satisfactory answers than those he appears to have given. The late act of parliament does not apply in this case, so as to let in a statement by affidavit, for the purpose of explaining the prisoner's conduct. It only authorizes the Court to enquire into the truth of the facts stated on the face of the return to the *habeas corpus*. All that the act of parliament enables us to do is to enquire whether, in point of fact, there was such an examination as the return states, and whether such and such questions were put, and such and such answers given. The act does not, in a case like this, authorize the Court to enquire into all the circumstances of the defendant's conduct by affidavit.

HOLROÏD J. I am of opinion that the prisoner must be remanded, for the reasons stated by the com-

1820.

In Re

JOHN JAMES.

missioners in their warrant; and I also think that the late act of parliament does not apply to this case.

BEST J. The application for a *habeas corpus* was made to me at chambers, on a suggestion, that the prisoner was in a state of intoxication when he was examined by the commissioners, and that that fact could be satisfactorily demonstrated by affidavits. Under the circumstances represented to me, I certainly thought that it was a fit case in which to grant the *habeas corpus*, in order that the commissioners might have an opportunity of falsifying the fact, if it was not true. I am, however, now convinced, that the act of parliament brought in by my brother *Onslow* does not apply to this case, and that it is not competent for us to allow the production of affidavits explanatory of what took place before the commissioners. It appears to me, that upon the answers given by the prisoner, the commissioners were well warranted in committing him, and therefore that he ought to be remanded. He will have an opportunity hereafter of explaining, if he can, to the commissioners, the circumstances under which the bills of lading were destroyed.

The prisoner was remanded.

1820.

8th Feb.

PRIEST against MILNES.

The sheriff having levied upon goods in possession of a defendant, who was a bankrupt, paid over the proceeds to the assignees, on their claiming them, and defendant afterwards again becoming a

bankrupt, and obtaining his certificate, but not paying 15s. in the pound (and therefore not protected by 5 *Geo. 2. c. 30. s. 9.* a second execution issued for the same debt; and held, that the latter execution was regular, without the first writ having been returned.

THIS was a rule, calling on the plaintiff to shew cause why a second execution, under a *fi. fa.* against the defendant's goods, should not be set aside, on the ground that the plaintiff's debt had been satisfied by a former execution. The facts were these:—When the first *fi. fa.* was executed, the sheriff levied the sum of 50*l.*; but finding that the defendant was then a bankrupt, he paid over the money to his

assignees, and the writ fell to the ground. Since then the defendant had again become bankrupt, and had obtained his certificate; but it did not appear that he had paid 15s. in the pound, as required by 5 Geo. 2. c. 30. s. 9. so as to discharge his future effects. After the certificate, the plaintiff sued out a fresh execution, and that execution, it was the object of the present motion to set aside.

1820.

 PRIEST
 against
 MILNES.

Blackburne now shewed cause, and contended that the second execution was regular, referring to *Coverley v. Morley* (a), where it was held, that in an action against a bankrupt, who has obtained his certificate under a second commission, the certificate is no bar, unless it appears affirmatively that his estate has produced 15s. in the pound; and evidence that it will probably produce so much is not sufficient.

Parke, in support of the rule, insisted that the second execution was irregular, and ought not to have issued until the sheriff had made a return to the first writ, and that in all events the second writ should have been special. The sheriff having made no return to the first writ, the regular course would have been to move for a *sci. fa.* against the defendant, to shew cause why a second execution should not issue upon that writ. The sheriff should either have returned *nulla bona* to the first writ, or a special return of *fi. feci*, and that he had paid over the proceeds to the assignees; and then the Court might have awarded a second execution.

PER CURIAM. The second execution is perfectly regular, because the first writ was wholly ineffectual, inasmuch as the levy was upon the property of the assignees, to whom the proceeds were paid over by the

(a) 16 E. R. 225

1820.

PRIEST
against
MILNES.

sheriff. The second writ, therefore, need not be special, for in effect the sheriff took nothing under the first. It is not shewn by the defendant that the sheriff took any thing under the second execution, which was privileged by the certificate under the second commission. Supposing the sheriff had returned to the first writ, that he had levied, as between the plaintiff and the assignees under the first commission, that would have been no objection to the second execution. But in fact the question here does not arise, as between the sheriff and the defendant, and the return to the first writ is quite immaterial. The defendant must shew that the first writ has been operative, before he can complain of the second. The sheriff could not properly return *fi. feci* to the first writ, because in legal effect, he took the goods from the assignees of the bankrupt.

Rule discharged.

BARON AND FEME.

HARTFORD *against* MATTINGLY.

H. T. 54 Geo. 3.

GASELEE moved to enter up judgment against husband and wife, on a warrant of attorney given by the woman *dum sola*, and cited 1 *Shower's Rep.* 91.

Judgment allowed to be entered up against husband and wife on warrant of attorney given by *feme dum sola* (a).

DAMPIER J. said that he could see no reason against its being done, and therefore granted the rule.

Rule granted.

(a) See *Tidd*, 7th ed. 570. n. (4).

GLOVER *against* PROPRIETORS OF DRURY LANE.

1818.

24th May.

TADDY moved to set aside an inquisition, for misdirection of the under-sheriff. This was an action for the wages of the plaintiff's wife, due from the proprietors of the theatre. Wages to the amount of 100*l.* had been paid to Mrs. *Glover*, after notice from the plaintiff not to pay to her. The under-sheriff directed the jury, that the wife having the care of the plaintiff's children, and maintaining them, and living separately from her husband, she might be treated as the agent of her husband. The verdict was one farthing damages. [Lord ELLENBOROUGH C. J. Were the wages before the notice paid under any authority from the husband?] *Taddy*. None appeared. [Lord ELLENBOROUGH C. J. Did the husband contribute to the maintenance of the children?] *Taddy*. Nothing very

Though wife live separate from her husband, and support her children, and earn salary for her services, yet the party owing it cannot pay her after notice not to do so; and if he do, the husband may sue him for the salary.

1818.
 — — —
 GLOVER
against
 PROPRIETORS
 OF DRURY
 LANE.

distinct appeared on that ground. [Lord ELLENBOROUGH C. J. The wife was the meritorious cause of debt.]

Rule Nisi.

On *Wednesday, 10th June, Pollock F.* shewed cause, and the *rule* was made *absolute*. THE COURT holding that the husband was undoubtedly entitled to the wife's earnings; and the payment having been made after notice not to pay, was inoperative.

HOLROYD J. referred to *Buckley v. Collier, 1 Salk.*
 114.

BILLS OF EXCHANGE, AND NOTES.

MARRYAT against WINKFIELD.

1820.

12th Feb.

BURMESTER had moved to make a rule absolute, upon affidavit of service, for referring it to the Master to compute principal and interest upon a bill of exchange, authorizing the defendant to sign final judgment, and execution thereon, without a writ of inquiry; where

It is no cause against a rule for referring a bill of exchange to the Master to compute, to shew that the judgment signed was irregular; such irregularity must be the subject of a counter motion, to set aside the judgment *a*.

Chitty said he was instructed now to move to set aside the judgment, on the ground of irregularity; the irregularity being, that the declaration was delivered with notice to plead in eight days, the judgment being in fact signed at the expiration of four days.

HOLROYD J. said, that *Burmester's* rule would be absolute as a matter of course, and that the objection to judgment was not now available in shewing cause against the rule, but must be made the subject of a counter motion. A rule therefore might be taken to shew cause at Chambers, why the judgment should not be set aside; and in the mean time *Burmester's* rule might be enlarged until that motion was disposed of.

Chitty accordingly took a rule *nisi*, for setting aside the judgment.

(a) See 1 *Taunt.* 487. *Tidd*, 7th ed. 591.

1816.

BROWN against LEONARD and BUSH.*6th May.*

A party is liable on a promissory note made in the name of the firm in which he had been a partner, though it was drawn after the dissolution of the partnership, he having suffered his name to continue in the firm, and although plaintiff knew the facts at the time he took the note.

SCARLETT moved to set aside a verdict for the plaintiff. The action was brought on a promissory note, according to the direction of the *Lord Chancellor*. *Spring, Leonard, and Bush* were partners. *Bush*, the defendant, before plaintiff became the holder of the note, informed him that he had ceased to be a partner with *Leonard* and *Spring*, but that his name was to continue for a certain time. The question was whether *Brown* the plaintiff, having this private notice of the dissolution of partnership as to the defendant, *Bush*, was bound by such knowledge. *Brown* the plaintiff was the payee, and the notes were drawn by *Spring* in the name of the partnership of *Spring, Bush, and Leonard*. *Bush* was out of the partnership when these notes were drawn, but his name was to continue until a future day.

BAYLEY J. *Brown*, notwithstanding the knowledge of the dissolution of the partnership, knew that *Bush's* name was to be continued, and that he was therefore responsible; and of course he relied on that responsibility.

ABBOTT J. I am of the same opinion; he must be taken to have relied upon that responsibility which *Bush* himself had stated to him.

LORD ELLENBOROUGH C. J. *Bush* said he would take care that money should be ready for the notes, and so took a direct responsibility.

Rule refused.

WRIGHT and others, against PULHAM.

1816.

9th Nov.

TOPPING moved to set aside a verdict for the defendant in an action tried before LORD ELLENBOROUGH C. J. at *Guildhall*. The action was brought on a bill of exchange. The partnership was dissolved after the bill was dated, but before it was in fact drawn and accepted. One question was whether, after the dissolution, the other partners could be affected; and the other, whether the notice in the *Gazette* was sufficient against the defendant, who, it did not appear had had actual notice of the dissolution.

A bill drawn and accepted after the dissolution of partnership, though dated before, does not bind the other partner. Notice of the dissolution in the *Gazette* is notice to all the world.

THE COURT held that the verdict was correct.

Rule refused.

WALTON against HASTINGS.

1816.

6th May.

JERVIS moved to set aside a nonsuit. The defendant was the acceptor. The date was altered. The acceptor suggested the alteration to the son of the payee who presented it for acceptance, and he altered it in the presence of the acceptor, who accepted it afterwards.

A bill of exchange, altered in the date by the son of the payee, at the suggestion of the acceptor, who afterwards accepted it, is unavailable (*a*).

LORD ELLENBOROUGH C. J. Can you let a stamp go on from time to time till it shall find a good bill that it can fit? It was a good bill at the time, and available; and if the parties change their intention it makes a new bill and should have a new stamp, particularly if done without the consent of the parties.

(a) See this case at *Nisi Prius*, 4 *Campb.* 223. 1 *Stark.* 215. *Chitty on Bills*, 6th ed. 104. n. 1.

1816.

WALTON
against
HASTINGS.

BAYLEY J. At all events, the bill in its original shape was binding on the drawer.

ABBOTT J. It was binding on the drawer; and if so, you would make it binding on one party. and not on the other.

Espinasse. It would make no difference to the revenue, for the commissioners would allow the stamp.

LORD ELLENBOROUGH C. J. That can make no difference as to the validity of the bill.

Rule refused.

1815.

26th Jan.

JOHNSON against GARNETT.

Bill altered in date after acceptance, but before it was put into indorser's hands, held good.

PARKE, for the defendant, moved to enter a non-suit in an action on a bill of exchange which had been altered after drawn and accepted, in the date, from 8th to 28th *June*.

LE BLANC J. Was it altered upon a subsequent reason and for a subsequent purpose?

Parke. It was. At the trial I cited *Calvert v. Roberts*, 3 *Camp.* 343; and Mr. *Scarlett* cited *Peyton v. Winter*, 1 *Taunt.* 420.

ELLENBOROUGH C. J. I left it to the jury, whether upon the evidence they did not think that the acceptor was the creature of defendant, and defendant altered it as agent of acceptor; and jury so found.

Parke. My objection proceeds on the stamp laws; and even *Garnett* himself, if acceptor, though he might alter it before acceptance, yet could not alter it

after, and *Garnett*, as *Gibb's* agent, could not do more than *Gibb* himself; and *Gibb* as acceptor could not, after acceptance, alter it.

1820.

**JOHNSON
against
GARNETT.**

LE BLANC J. You mean to say, that the acceptor may alter the bill before acceptance, but cannot after.

ELLENBOROUGH C. J. The bill had not been handed over to *Johnson* before alteration, had not been in his hands. Defendant asked *Johnson's* leave to alter the bill. I left it to the jury as a thing *in fieri*. The acceptor gave, according to the finding of the jury, authority to drawer to alter it as he liked, and at that time it was not negotiated.

BAYLEY J. It never got into *Johnson's* hands, before it was altered.

LE BLANC J. Whilst the parties were all together, and before bill completed, they agreed it should be altered from 8th to 28th.

ELLENBOROUGH C. J. The act still was to be done.

Rule refused.

JOHNSON against GIBB.

1815.

Easter Term.

TOPPING moved for a new trial. Plaintiff non-suited action against acceptor by indorsee, drawn by *Garnett* upon *Gibb*, 28th June, 1814, sixty days after date; brother of *Johnson* had claim on *Garnett*, for which *Garnett* gave this bill, carried to *Gibb* for acceptance; after accepted, altered from 8th June to 28th, without knowledge of *Gibb*; *Johnson* present

Though bill altered by drawer after acceptance with consent of the plaintiff the payee, but without the actual assent of the acceptor; and which alteration made

the bill payable 20 days later; yet, *semble*, the acceptor is liable, where it appears to be an accommodation-bill, and acceptor would accept any bill drawn by the drawer, and therefore strong presumptive evidence that the drawer was sufficiently the agent of the acceptor to have authority to make this alteration.

1813.

JOHNSON
against
GIBB.

when altered; difference of interest paid by *Garnett*. It was an accommodation bill; and contended, that *Garnett's* action, and some evidence that *Gibb* indemnified by *Garnett*, but disproved.

ELLENBOROUGH C. J. I left it to the jury to find for defendant, unless they thought that there was a general authority from *Gibb* to *Garnett* to draw upon him, and that *Gibb* would accept any bill.

Rule *nisi* for new trial, on payment of costs.

On 31st May, 1815, the rule was made absolute.

1814.

27th Jan.

HENRY against LEE.

A witness on the trial of a cause may refresh his memory from a document, though not written by himself.

Presentment of a bill out of the usual hours is sufficient, provided somebody be at the place, and also sees the bill, or gives an answer, otherwise not (a).

TOPPING moved, on behalf of the defendant, for a rule to shew cause why a new trial should not be had, under the following circumstances. The plaintiff was a jeweller at *Liverpool*, and the indorsee of a bill of exchange, drawn and indorsed by the defendant, and accepted, payable at a banker's, *London*. The defendant pleaded the general issue and bankruptcy, and a verdict was found for the plaintiff.

At the time of the trial, a material witness said he did not recollect a fact; but having looked at a paper which he himself had not written, he said that he distinctly recollected the circumstances, though he had before said that he did not know whether he should recollect the circumstances after looking at the paper; and *Topping* contended, that this was neither sufficient, nor the best evidence.

LORD ELLENBOROUGH C. J. It is sufficient if a man can positively swear that he recollected the fact,

(a) See *Garnett v. Woodcock*, 1 Stark. 475; *Chitty on Bills*, 277, 6th ed. S. P.

though he had totally forgotten the circumstance before he came into Court; and if upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference, that the memorandum was written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness.

1814.

HENRY
against
LEE.

Topping now made another ground of objection, namely, that the bill of exchange was presented after usual hours.

LORD ELLENBOROUGH C. J. It is not in general sufficient, and it will not do if nobody is there to receive; but if somebody is there, and the person presenting the bill gets an answer, which I understand was the case here, it is sufficient.

BAYLEY J. If it is presented after the usual hours, it is at the peril of the person presenting it; for if nobody is there, it will not do; but if there is, then it is immaterial at what time it is presented.

Rule refused.

POLE *against* FORD.

1816.

27th Nov.

CHITTY moved to enter satisfaction on a judgment against the drawer of a bill of exchange, or that plaintiff might be prohibited from issuing execution on such judgment. The plaintiff had proceeded on the same bill against the acceptor and drawer, and had obtained judgment against each, and sued out a *fi. fa.* against the acceptor, and took his goods in execution, which he afterwards abandoned, and gave time to acceptor, by receiving from him another security to pay at a future time. He contended, that this discharged the drawer, and was a satisfaction as to the bill.

The drawer of a bill is not discharged, though a *fi. fa.* sued out against the acceptor on the same bill be waived.

1816.

POLE
against
FORD.

ABBOTT J. expressed considerable doubt of ~~this~~, and hesitatingly granted rule *nisi*. The rule was enlarged till next Term, when *Scarlett* shewed cause against the rule in the next Term, and the Court determined, that the withdrawing the *fi. fa.* against the acceptor, did not discharge the drawer, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment.

1817.

STRATTON ~~against~~ HILL.

16th Jan.

Debt lies on a bill of exchange payable to the drawer's own order at the suit of the first indorsee against such drawer.

MEREWETHER moved for a rule *nisi* in arrest of judgment. The declaration was in debt; the first three counts were for rent. The two next counts on bills of exchange, and the money counts. The bills were drawn by the defendant, payable to his own order, and indorsed by him to the plaintiff. He objected, that debt would not lie against the maker by the indorsee of a bill, and that there was a general verdict on all the counts. *Per Lord Eldon, Bishop v. Young, 2 Bos. and Pul. 78*, and the cases there cited.

Rule *Nisi*.

Taunton and *Chitty, contra*, obtained a rule *nisi* to amend the *postea*, and enter a verdict only on the first three counts, and that both rules should be brought on together.

On 27th November, *Taunton* and *Chitty* declined availing themselves for the present of their cross rule, and answered the objection raised by *Merewether*, contending that debt would lie by the payee against the maker of a bill of exchange, and that the plaintiff in this suit being the first indorsee of a bill payable to the maker's own order, was the same as payee;

and they commented on *Bishop v. Young*, and relied on the case in *Skinner* there mentioned.

THE COURT thought the plaintiff here was to be taken as the payee, and accordingly, *Merewether's* Rule was discharged, with costs.

1817.

STRATTON
against
HALL.

VERLEY against SAUNDERS.

26th Jan.
1817.

TADDY moved to set aside a nonsuit, stating that the action was brought on a bill of exchange, drawn the 19th May, by one *Starke* on the defendant, at four months after date. The defendant accepted it, and *Starke* indorsed it. The defence set up at the trial was, that there was a deed of dissolution of partnership between *Saunders* and *Starke*, dated before the bill was drawn. That the accounts between *Saunders* and *Starke* were in progress, but not settled. By a certain deed *Starke* was to pay the debts, and receive the credits, and a balance was to be struck by a certain time. The bill had been in *Price* the ^{banker's} hands, when due; but was dishonored and returned to *Starke*, who indorsed it over after it was due. On these circumstances LORD ELLENBOROUGH C. J. thought this was a good defence.

A bill given for a supposed balance of accounts, to be hereafter settled on a day appointed, and which bill was dishonoured by the acceptor (the defendant) and after it was due indorsed by the drawer to the plaintiff, the relative situation of debtor and creditor not being created between the drawer and acceptor, the plaintiff cannot maintain an action on it as indorsee.

Taddy contended, that the rule that a party taking a bill after it is due holds it subject to the same objections that would have affected it in the hands of the indorser, went too far, and did not govern this case. It was first ruled in *Brown v. Davis*, 3 T. R. 80. and the cases there cited in notes; *Charles v. Marsden*, 1 Taunt. 224. that it was incumbent on the defendant to impeach the consideration of the bill, which he had not done. *Saunders* accepted the bill, because he knew that on a settlement of the accounts between him and *Starke*, such a sum would be due from him.

1817.

KERLEY
against
SAUNDERS.

BAYLEY J. There is no provision in the deed of dissolution as to the bills drawn *inter se*. *Charles v. Marsden* was on a demurrer, and therefore there was no evidence; here it could be, and was shewn.

LORD ELLENBOROUGH C. J. read the notes of the evidence: first, the hand-writing; secondly, that the bill was given on the partnership account. The evidence for the defendant was, that there was no indorsement when the bill was returned dishonoured to the drawer. That a balance was struck on 7th *June*, and that *Starke* was heard to say, that he was not to proceed for this bill.

LORD ELLENBOROUGH C. J. I certainly took it that the bill was for an unliquidated account; that there was a day fixed for the liquidation, which was the 7th *June*; and that day not being come when the bill was drawn, there was no relative situation of debtor and creditor.

Tally contended, that the Court could not extend the presumption upon the bill being overdue farther than it has been carried already.

LORD ELLENBOROUGH C. J. That is a different question. The case does not proceed on that ground at all.

Rule *Nisi*.

1817.

23rd Jan.

WIGAN against FOWLER and another.

The stat.
 4 Geo. 3, giving
 protection to
 the Bank of
 England
 against compe-
 tition, does not
 prevent mer-
 chants from is-
 suing bills short of six months date, though there be more than six partners in their firm,
 if really not bankers, and only done for the purpose of their commerce.

SCARLETT moved to enter a nonsuit. The action was brought on a bill of exchange. The statute 4 Geo. 3. directs that not more than six persons in partnership together should take up promissory notes, unless dated for six months.

LORD ELLENBOROUGH C. J. My impression at the time was, that the statute was only intended to apply to bankers, and to restrain their number, and not to apply to transactions in the ordinary course of commerce.

1817.
WIGAN
against
FOWLER,
and another.

BAYLEY J. *Who is the plaintiff?*

Scarlett. The party who discounted the bill.

BAYLEY J. Does it appear on the bill how many partners there are? The statute seems to be only prohibitory.

LORD ELLENBOROUGH C. J. If this is the construction of the statute, it would enable any secret party in a firm who gave a bill, where there are more than seven partners, to defeat it, which would be a most dangerous doctrine.

ABBOTT J. Does the statute make the bill void,

Scarlett. No.

BAYLEY J. Then it is only penal against those who knew the fact.

Rule refused.

CERTIORARI.

1820.

THE KING *against* HENRY HUNT, *and others.*

12th Feb.

A *certiorari* will not be granted to remove an indictment against several defendants charged with a misdemeanor, unless they all concur in the application ; and it seems that a consent by counsel is not sufficient, unless supported by an affidavit of the consent. The Court will remove an indictment for a misdemeanour from *Lancashire* to *Yorkshire*, if there is any reasonable cause of suspicion or apprehension that justice will not be impartially administered in the former county.

THIS was an indictment found by the grand jury, at the last assizes for the county of *Lancaster*, against *Henry Hunt* and nine other defendants, charging them with a conspiracy to disturb the peace, &c. and in pursuance of that conspiracy, causing a multitude of persons to assemble at *Manchester*, on the 16th of *August* last, with seditious and inflammatory flags, &c. and thereby disturbing the peace, &c. On a former day the defendant *Hunt*, in person, obtained a rule to shew cause why a writ of *certiorari* should not issue, directed to the Justices of *Quar* and *Terminer*, and *General Gaol Delivery* in and for the county palatine of *Lancaster*. commanding them to remove into this court an indictment against *Henry Hunt* and nine others, upon all the defendants consenting to proceed to trial at the next assizes, to be held for the county of *York*, or such other county as the Court shall please to direct ; pleading immediately and taking short notice of trial at such next assizes ; entering into fresh recognizances to appear at their trial as before ; the prosecutor having liberty to give notice of trial at such next assizes. The affidavit upon which this rule was obtained, suggested, that the defendants could not have a fair and impartial trial in the county of *Lancaster*, as the deponent (*Henry Hunt*, who made the affidavit) verily believed, by reason of the prejudices which prevailed in, and in the neighbourhood of *Manchester*, against the defendants, in consequence

of the transactions in that town of the 16th of *August* last.

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The *Attorney General* and the *Solicitor General*, for the crown, now shewed cause against the above mentioned rule; and in the first instance, objected, that the application was founded upon the affidavit of one defendant only, and there was no evidence before the Court that the other defendants concurred in the motion.

Chitty for the other defendants alluded to, interposed, and said, that he was now instructed to consent on behalf of those persons, to any terms that the Court should impose, in order to give effect to the application for the *certiorari*, and the removal of the indictment into *Yorkshire*.

THE COURT said, that the consent of counsel in this instance might not probably be binding upon all the defendants; and as there was no attorney upon the record for the defendants, the Court must require some evidence that all the defendants were *bonâ fide* consenting to the application, and really meant to be bound by such rule, as the Court might think proper to pronounce.

In consequence of this requisition, time was given for the production of additional affidavits for the satisfaction of the Court, and accordingly the affidavits of *Henry Hunt*, *Charles Pearson*, and *William Dunn*, were produced, from which it appeared that all the defendants had originally instructed and retained *Mr. Pearson* to act as their attorney, when this indictment was found by the grand jury, by putting in bail on their behalf, and preparing their defence, when their trial should come on; and that he was

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now instructed to consent to such rule as the Court might be pleased to pronounce, in order to carry this application into effect; that the other deponent, *William Dunn*, had, since this rule was granted, seen all the other defendants except one, and had procured their several written consents to this application; and that with respect to the other defendant, who was now a prisoner in *Lancaster Castle*, he had obtained his consent from a near relative of that person, duly authorized to give such consent. Upon the production of these affidavits the Court suffered the case to proceed.

The *Attorney General* and *Solicitor General*, in shewing cause against the rule, contended, *first*, that this application was too late, having been made nearly at the close of the Term, when there was no possibility of procuring affidavits on behalf of the Crown, in answer to those on which the rule had been obtained; and therefore as the alleged reason for removing the indictment had existed ever since the indictment was found, the Court, under these circumstances, would not make this rule absolute. *Second*, supposing this an objection, which would not prevail with the Court, there was no ground made out for changing the venue into another county from that in which the indictment was found. The affidavit upon which the motion was made, contained nothing from which the Court could presume that the defendants would not have a fair and impartial trial, in the large and populous county of *Lancaster*. All that the deponent ventured to state was, his belief that he could not in that county have a fair and impartial trial; but there were no facts stated from which the Court could draw this inference. It was impossible then, without some evidence of that sort, for the Court to enter a suggestion upon the record, that a fair and impartial trial could not be had in *Lancashire*, as the ground for moving

the indictment into *Yorkshire*. The Court must decide upon facts and circumstances, in order to justify them in drawing the conclusion which the defendants, without facts, had suggested. The mere belief of the party that he should not have a fair and impartial trial, in the county from whence he sought to remove the indictment, was not sufficient, and reference was had to *Rex v. Harris*(a), *Rex v. Amery*(b), and *Rex v. Waddington*(c); therefore the rule must be discharged.

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Chitty, for all the defendants except *Henry Hunt*, contended in support of the rule; *first*, that the lateness of the application was no answer to it, if the Court, under all the circumstances of the case, were satisfied that the defendants were entitled to have the indictment removed. *Second*, that it was enough if the defendants, who were indicted upon a most serious charge, ventured upon their oaths to state positively that they verily believed, from their knowledge of the state of the public mind in the county of *Lancaster*, upon the subject of the transactions to which the indictment referred, that they could not expect a fair and impartial trial in that county. It was not necessary that they should state facts and circumstances to enable the Court to draw this conclusion; still less was it necessary to state such facts and circumstances, for the purpose of entering the suggestion on the record, because the suggestion would not be traversable. It was enough for the conscience of the Court, if the defendants themselves undertook to swear as to their belief upon this subject, because this was sufficient, for the purpose of this application, to justify the suggestion. If the Court saw sufficient reason for removing the indictment, such a rule might be drawn up, as would

(a) 3 Burr. 1350.

(b) 1 T. R. 363.

(c) 1 E. R. 145.

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bind all the defendants to a compliance with the terms on which the *certiorari* should go ; and the consent of counsel for this purpose was quite sufficient to bind the defendants.

Mr. *Hunt* addressed the Court in support of the rule, as far as it concerned his interests ; and he urged, amongst other topics, that if there was the slightest suspicion as to the administration of impartial justice in this case, that was quite a sufficient ground for removing the indictment. It was therefore not necessary to state facts and circumstances, to shew that the defendants could not have a fair and impartial trial. It was notorious, that in the unfortunate transactions of the 16th of *August* at *Manchester*, several persons lost their lives. Many of the relations, friends, or acquaintance of those persons, might happen to be summoned on the jury to try this indictment ; and it could hardly be supposed that those persons could divest themselves of the prejudices naturally arising from such causes. The bare chance, therefore, of having such persons on the jury, was sufficient to raise a doubt as to the impartial administration of justice. That doubt ought to turn the scale in favour of this application.

THE COURT said, it was of the greatest importance, that the administration of justice should not only be free from spot or blame, but that it should be, so far as human infirmity could allow it to become, as free from all suspicion. The great difficulty, and almost the only difficulty, which the Court felt in granting the present application, had arisen from the conduct of those by whom the application was made, and the lateness of the time at which the matter was brought before the Court. The removal of an indictment from one county to another is attended with

serious consequences, both as it affects the defendants, who are parties to it, and as it respects the prosecutors. As to the defendants the consequences are most serious, because it may have the effect of carrying many of them, at a great expense, and under circumstances extremely inconvenient, from the neighbourhood of their own residence, to a more distant county. As to the prosecutors, it was also attended with serious consequences; because, when a writ of *certiorari* is granted, it became necessary that the defendants should enter into fresh recognizances, in order to secure their appearance to take their trial, when the indictment came to be removed into another county. For these reasons it was necessary that the Court should be perfectly satisfied, that the defendants were all desirous of having the indictment removed, and also that the effect of that removal should not be to delay the trial, and cause it to be postponed until another assizes. The difficulty of preventing that was great, on account of the time at which the application was made, and the short period likely to elapse before the assizes occurred. But certainly that difficulty was not absolutely insurmountable; it was not insurmountable, if all the defendants were really in earnest in the application that had been made, and were desirous of obtaining the benefit of it without causing delay to the prosecutors. There were circumstances somewhat extraordinary in the conduct of the parties who made the application; but as the great object of the Court was to take care that the administration of justice should be free from all suspicion, the Court upon that ground had made up its mind to accede to the application. The Court were not influenced by the suggestion, that as fair and as impartial a trial could not be had in the immensely populous county of *Lancaster*, as in any other; but as it was possible that persons connected with those who were

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the opponents of the defendants, in the transactions which were the subject of the indictment, might be on the jury, and as that fact would be a good cause of challenge to such persons, the Court were disposed to make the rule absolute, subject to certain limitations which would be propounded.

The rule was then made absolute for the *certiorari*; and the Court after ordering a suggestion to be entered upon the record of the cause of the removal of the indictment, ordered a rule to be drawn up, requiring the defendants, within ten days, to enter into fresh recognizances, to take their trial at the next assizes for the county of York, to take short notice of trial for such assizes, and to appear and plead *de novo* forthwith; and it was further ordered, that the service of all notices and proceedings, touching the prosecution, on Mr. Charles Pearson, should be deemed good service, upon all the defendants respectively. Lastly, that if the terms of this rule were not complied with in the time specified, a *procedendo* should issue, and the *certiorari* should become a nullity.

1815.

26th April.

REX against ———.

A statute taking away a *certiorari* does not take it from the crown, unless expressly mentioned (a).

SPANKIE moved for a *certiorari* for the Crown. The act took away the *certiorari*, but he contended that that was only from the subject, and not from the Crown; and he mentioned the case of *Rex v. Justices of Cumberland*.

BAYLEY J. assented to the doctrine, and granted a rule for the *certiorari*.

(a) See *Rex v. Davis*, 5 T. R. 626. *Burn J.* tit. 'Certiorari.'

REX *against* ———

1816.

7th Feb.

PULLER moved for a *certiorari* to bring up a conviction before a magistrate for selling other than a *Winchester* bushel. The defendant produced the vendee before the magistrate as a witness, and the magistrate rejected him as incompetent.

Certiorari granted to bring up a conviction where the magistrate had rejected the vendee as a witness, to prove that the defendant used the *Winchester* bushel.

BAYLEY J. granted it.

Rule for a *certiorari* granted.

ANONYMOUS.

1813.

19th Nov.

THE Attorney-General moved for a *certiorari*, to remove proceedings, from before Commissioners of Sewers, for improperly rating *Martello* towers, by Board of Ordnance.

There must be a rule *nisi* in first instance for *certiorari* against commissioners of sewers.

ELLENBOROUGH C. J. It must be a rule *nisi*, for we do not remove the proceedings from the Commissioners of Sewers in the first instance.

Rule *nisi*.

COMMITMENT.

1815.

26th April.

REX against CROKER.

It is not necessary, on prisoner being brought up by *habeas corpus*, that the warrant of commitment should state that it was feloniously done. It may be a sufficient ground for committing, and not bailing, though the ground would not be sufficient to convict (a).

GURNEY, for the prisoner, who was brought up on *habeas corpus*, contended that the warrant of commitment did not state that the act was done feloniously, and that therefore there was no ground for the commitment.

Marryat contended, that it had been decided not to be necessary. The offence here appeared to be the embezzling bank notes to the amount of 3000*l.* and cited the *King v. Judd*, 2 Term Rep. 255; 2 *Leach*, 544. to shew that the word "feloniously" need not be used in the commitment.

LORD ELLENBOROUGH C. J. Though there may not be sufficient facts formally stated to sanction a verdict of "guilty," yet it is sufficient if the *corpus delicti* be shewn to us to ground the commitment. The act says, that the offence shall be deemed a felony; we have, therefore, only to see that there was sufficient to found a commitment. A commitment need not have the precision of an indictment. The commitment states general evidence; and though not formally sufficient to find him guilty, there was enough to justify the commitment.

(a) Sec 3 *East*, 157. 1 *Chit. Crim. L.* 112, 113.

BIDDLE, q. t. *against* USTONSON.

1814.

5th Feb.

SELWYN moved, that the defendant in this case might be committed under the 12 *Geo. 2.* being the Goldsmiths' Company Act, which directed, that after judgment, if the defendant did not pay the amount of the penalties he should be committed for three months by the Court in which judgment is obtained.

A commitment in execution for three months on 12 *Geo 2*, the Goldsmiths' Company Act, for not paying penalties recovered by judgment in an action, cannot be obtained, till a *fi. facias* has been imperfectually issued.

THE COURT however thought, that as the plaintiff had proceeded by action, he ought to go on to the ulterior steps, and should have sued out a *fi. fa.*; after which, if the defendant did not then pay, the plaintiff might come to the Court again, and it would interfere.

Selwyn took nothing by his motion.

N. B. As the defendant was insolvent, the Court suggested the expediency of taking out a *ca. sa.* against the defendant, which would answer all the purposes of the commitment.

CONSTABLE, &c.

1818.

11th April.

NORTON against MILLER.

Constable seizing a person by direction of Custom-house officer, who had himself no power to seize, is not within protection of the Custom-house act, there being no pretence that he was acting within the scope of his duty.

SCARLETT moved to set aside a verdict for the plaintiff for 1600*l.* damages. The defendant was a constable, and went on board a ship with the collector of the customs ; and by his order, and without any warrant, plaintiff was taken on shore to be carried before the magistrates, and was imprisoned five days, waiting for a witness. He referred to 24 *Geo. 3. c. 47. sec. 35.* reciting a previous statute as to excise officers, and enacting, that it shall be extended to custom-house officers, and any person acting under their order. It extends expressly to persons aiding custom-house officers. He then cited 21 *Geo. 3. c. 37. sec. 2.* giving a power to seize implements of manufacture intended to be put on board, and a power to search without a warrant, on a bare suspicion ; but he admitted that there was no power under any act to detain any person. Here there was an excess of jurisdiction ; but still the defendant was entitled to protection, for these acts were not intended to protect a party when he acted within the scope of his authority. He cited *Theobald v. Crickmore*, 1 *Bar. and Ald.* 227. [BAYLEY J. There the defendant was doing something connected with his duty.] *Scarlett*. I admit there was an excess of authority ; there had been recently many exports and embarkations. There was an order from the Treasury, and many persons had been arrested. [ABBOTT J. The magistrate had a power to grant his warrant to any body.] [Lord ELLENBOROUGH C. J. The defendant made a gross blunder, in exercising as a custom-house officer an au-

thority he could acquire only under a magistrate's warrant; then it was a mere blunder. Was there any subsequent effort to bring themselves in a due course? They lost their passage.]

1818.
NORTON
against
MILLER.

Scarlett. The captain refused to take them.

LORD ELLENBOROUGH C. J. The party who does the wrong must be responsible for all the consequence.

Scarlett. It does not appear why the captain refused to take him.

LORD ELLENBOROUGH C. J. The defendant had no other authority than any other person in the realm. He has no pretence for authority, or for saying that he was within the precincts of the law.

ABBOTT J. The acts must be taken with reference to the party's office, and there is no pretence that this was within the scope of the defendant's office.

Rule refused.

CONTRACT.

1814.

28th April.

Contract to deliver pheasants on the 1st of *October*. It is sufficient if they be sent on that day to the coach-office, though they do not arrive till afterwards.

SIR J. HONEYWOOD *against* STONE.

PARKE moved for a rule to shew cause why the verdict obtained for the plaintiff in this cause should not be set aside, and a new trial granted. The action was brought on a contract for the exchange of horses; and it was contended, that the plaintiff had not performed his part of the agreement, which was, that if he did not approve of the horse sent to him by the defendant, he should send it back, with a brace of pheasants, on the 1st of *October*. It appeared that the pheasants were killed on the 1st of *October*, and sent to the coach-office, but that they did not arrive till a subsequent period.

LORD ELLENBOROUGH C.J. All was done that could be done, or that ought to have been expected. The delivery to the carrier on the first of *October* was equivalent to a delivery to the defendant.

PER CURIAM.

Rule refused.

1818.

14th April.

Two persons contracting to assist defendant with their respective horses, but to give in their accounts separately, held separate contracts.

SMITH *and* TAYLOR *against* HUNT.

TAUNTON moved to set aside nonsuit. The question was, whether the plaintiff could join. It was an action for work and labour. The defendant carried from *Cheltenham* to *London*; he wanted assistance, and engaged the two plaintiffs to assist him with their horses; each had three horses, and the six drew the waggon.

LORD ELLENBOROUGH C.J. The contract was with the two.

1818.

SMITH and
TAYLOR
against
HUNT.

Taunton. The agreement was, that the two plaintiffs should make out separate accounts. All rested on that stipulation. [The judge thought it was a separate interest.] I resembled it to *Wellers and Wife v. Baker*, 2 *Wils.* 414.

BAYLEY J. There there was no separate injury to any one, all were equally injured.

Taunton. There was also tort; so in the case of the owners of two mills. *Coryton v. Lithebye*, 2 *Saund.* 116.

ABBOTT J. There they must join; neither could say the defendant was bound to grind at his particular mill.

Taunton. There is a case in *assumpsit* by ROLL J. cited from a note in *Sanders*. If here each was to have had 12*l.* it would have been separate; there was a servant of each of the plaintiffs there.

LORD ELLENBOROUGH C. J. The evidence that they were to account separately is strong to shew that it was a separate contract.

BAYLEY J. And it is necessary that it should be so, for otherwise the whole benefit of the contract would survive to the one upon the death of the other.

Rule refused.

CORPORATION, BYE-LAW.

1818.

23rd May.

Though bye-law of corporation requires indenture of apprenticeship to be inrolled, if it has been exhibited to town clerk, who marked it inrolled, it is sufficient, notwithstanding it is not inrolled in the corporation books.

2nd. Under bye-law, service at another place is not sufficient, unless the trade there was subservient to the trade at Cambridge

REX against MAYOR, &c. of CAMBRIDGE.

GASELEE moved for a *mandamus* to admit a freeman of Cambridge. The person applied as having been apprentice. 1st. By a bye law it was necessary that the indenture should be *inrolled*. The indenture was carried to the town clerk; he made an entry upon it of a memorandum, that it was inrolled; but on searching the books it did not appear to have been inrolled.

ABBOTT J. The party had done all he could.

Gaselee. It was the fault of the officer of the corporation.

LORD ELLENBOROUGH C. J. The officer had made a memorandum, and intended to have inrolled it, but did not do so.

Gaselee. The second point was as to residence. His father was a corn merchant. There was a bye-law to serve a free burgess for seven years as apprentice to the same trade as the master used, in the same town. The master had a manufactory at *Royston*, but lived at Cambridge. The apprentice lived with his father one year, and for the last six years at *Royston*, carrying on the trade at *Royston*: he cited *Rex v. Marshall*.

LORD ELLENBOROUGH C. J. Can an effectual non-residence be a residence? The object is, that the ap-

prentice should be instrumental in forwarding the trade of the town.

REX
against
MAYOR, &c. OF
CAMBRIDGE.

BAYLEY J. The trade at *Royston* was not in furtherance of the trade at *Cambridge*. Certainly it is a trade of the same kind, but it is not the same trade. A trade any where over the world then might be connected with that trade.

To move again if the affidavit can be amended.

Rule refused.

COSTS.

1820.

26th Jan.

DAWSON against SAMPSON.

The defendant was arrested at the suit of a plaintiff, who, becoming bankrupt, the proceedings were dropped, and the assignees having again arrested the defendant, the proceedings were set aside, the Chancellor having superseded the commission; but a fresh commission having issued, and another set of assignees being chosen, they arrested the defendant again, and were proceeding in their action; Held, that these proceedings could not be stayed until the costs of the proceedings at the suit of the first set of assignees were paid.

Semble, Where proceedings have been set aside for irregularity, the plaintiff is not bound to pay the costs thereof, before he is at liberty to commence a fresh action.

E. *LAWES* moved to stay the proceedings in this action by the assignees of a bankrupt, until the costs of former proceedings for the same cause of action, which were set aside for irregularity, were paid. The facts were these: the bankrupt, before a commission was issued against him, had arrested the defendant, on bailable process; but, upon becoming bankrupt, no further proceedings were had. The assignees, under the commission, arrested the defendant again; but before they had proceeded to declaration, the commission of bankruptcy was superseded, and the proceedings in that action were set aside. A second commission was sued out against the bankrupt, and the now plaintiffs being the fresh assignees, again arrested the defendants, and were now proceeding in the action; and it was contended, that they could not do so until the costs of the proceedings at the suit of the first set of assignees were paid; but

BAYLEY J. (a) said, that the Court could make no order in the terms required, because the proceedings at the suit of the present assignees appeared to be regular, for they had nothing to do with the proceedings at the suit of the assignees under the former commission, which it appeared could not be supported. But supposing this were the ordinary case, where a party had commenced proceedings against a debtor,

(a) The only Judge in Court.

which turned out to be irregular, and were consequently set aside, could it be said that the plaintiff, to whom perhaps a sum of a thousand pounds might be owing, was to be restrained from commencing fresh proceedings until he paid the sum of 5*l.*, which he probably might not be able to raise, for the purpose of paying the costs of the first proceedings? This was a doctrine which the Court would require a very strong case to be made out, before it was propounded.

Rule refused.

1820.

DAWSON
against
SAMPSON.

EDGINTON *against* HOOD.

1813.

24th Nov.

A RULE was obtained, calling on the plaintiff to shew cause why he should not pay the defendant the costs of the action, under the statute 43 *Geo. 3. c. 46. s. 3.* the plaintiff not having recovered the sum for which he had arrested the defendant.

Costs for defendant under the 43 *Geo. 3. c. 46.* where a verdict was taken for a less sum than that which the plaintiff held the defendant to bail for, refused where the right to recover the whole sum claimed was fairly triable.

The action was on a bill of exchange for 60*l.*, whereof the plaintiff was indorsee, the defendant the indorser, and one *Jenkins* the acceptor, and the plaintiff only recovered judgment for 22*l.*

Jekyl and *Comyn* now shewed cause, and produced affidavits directly contradicting the affidavit on which the rule was obtained; and *Comyn* said, that the plaintiff's demand of 60*l.* was reduced by an account produced by *Jenkins* the acceptor, in which he stated that 40*l.* was paid towards this 60*l.*

LORD ELLENBOROUGH C. J. observed, that at any rate that was a questionable matter fit to be tried.

Comyn. There were two bills, and the 40*l.* paid was applicable to the other bill, and not this. The plain-

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Edginton
against
Hood.

tiff had no opportunity of laying any evidence before the jury, for the transaction was between the plaintiff and *Jenkins*, and the jury were disposed to defeat the plaintiff's claim. No vexation appears, and the plaintiff insisted on his claim before the action was brought.

Topping said it was as gross a case as any case could be. The defendant had done work for *Jenkins*, and between *Jenkins* and the plaintiff there were considerable money accounts; and *Hood* had no other transaction with *Edginton*. The affidavits on the part of the defendant stated, that before the action was brought defendant had repeatedly cautioned the plaintiff not to hold him to bail for the whole bill.

LORD ELLENBOROUGH C. J. After hearing the affidavits, said, I am not at all prepared to say that the plaintiff ought not to have recovered the additional sum of 40*l*. If there had been any payment specifically made, as in discharge of any particular bill, it might have varied the case. Here the payment was on the account general: there is no sum paid of the same amount as the sums charged. The rule of law is clear, that the payer may apply the money at the time of payment; if not, the payee may afterwards apply it. The plaintiff's demand against drawer is entire; and at any rate, it cannot be said that there was no ground for the arrest: it was a fit question to be tried, and even upon aailable arrest. *

Rule discharged.

1813.

29th Nov.

————— against *BONAR*.

Costs of a special original allowed between attorney and client,

THE plaintiff sued out a special original for 1600*l*. but only obtained a verdict for 20*l*., being arrears where action was brought on a bond, the penalty of which was more than fifty pounds, but the sum found due was only 20*l*. (a)

(a) See 1 *Tidd*, 6th ed. 95.

of interest secured by a bond, in the penalty of 1600*l*. As between attorney and client, the Master allowed the costs of proceeding by original, and *Parke* thereupon obtained a rule, calling on the plaintiff's attorney to shew cause why it should not be referred back to the Master to review his taxation, on the general rule, that if the plaintiff should proceed by special original, and recover less than the sum of 50*l*. he shall not, on taxing costs, be allowed any more or other costs than he would have been entitled to in case he had proceeded by bill, except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed.

1813.

 against
BONAM.

Jerris now shewed cause, and contended that this rule only applied to costs as between plaintiff and defendant, and not to those between attorney and client.

LE BLANC J. and DAMPIER J. The judgment must be for the penalty, and will stand as a security for the whole debt.

LORD ELLENBOROUGH C. J. He could only have sued for the penalty in the bond.

Parke. But he might have proceeded without the special original.

BAYLEY J. Then it is error.

LORD ELLENBOROUGH C. J. Your whole argument goes on the assumption, that the action is in fact for 20*l*., whereas it is for the penalty, and could not have been brought in any other shape. We cannot refer it back to the Master.

Rule discharged.

1820.

12th Feb.

HANCOCK^a against SMITH.

The Court will grant a rule, that plaintiff may give security for costs, though it does not appear that application has been made to him to give security, notwithstanding an express decision to the contrary in *Mic. 55 G. 3.*

WILDE, on a former day, obtained a rule to shew cause why the plaintiff should not give security for costs, upon an affidavit that he had become bankrupt, and that the suit was now carried on for the benefit of the estate.

Chitty now shewed cause against the rule, and contended, that as the defendant's affidavit did not state that any application had been made to the plaintiff for security, the rule could not be made absolute; and he referred to *Bass v. Clive (a)*, where Lord ELLENBOROUGH C. J. said, that it was an universal rule, that the authority of the Court was not to be interposed without ascertaining whether the party will refuse to give security. But per

ABBOTT C. J. That case has been overruled this morning, in an application precisely similar to the present. It is not necessary to shew that the plaintiff has refused to give the security, if it appear upon the affidavits that the case is such as to require the security to be given.

PER CURIAM (b).

Rule absolute.

(a) 3 M. & S. 283. See next case.

(b) Best J. was absent.

1810.

21st April.

ANONYMOUS.

The Court will not grant a rule to stay the proceedings till security for costs be given, unless a previous application be made to the plaintiff's attorney for security of costs; *aliter*, when it is not moved to stay the proceedings And *semble*, it must be sworn that defendant has not pleaded (c).

DWARRIS moved for a rule to shew cause why the proceedings should not be stayed till the

(c) See 9 M. & S. 283. 1 Tidd. 6th ed. 557. acc.

plaintiff, who was living at *Amsterdam*, should give security for costs, in case a verdict should be given against him, or he should be nonsuited. 1815.
ANONYMOUS.

DAMPIER J. Unless you produce an affidavit, that application for security for costs has been made to the plaintiff's attorney, and also that the defendant has not pleaded, the rule as to the staying proceedings cannot be granted.

Dwarris not being prepared with such an affidavit,
The rule was refused.

N. B. *Blackburn* made a similar motion without a stay of proceedings, and **DAMPIER J.** granted it, saying, that it might be obtained without an application to the attorney, if it was not to stay the proceedings, *sed quare*. See 3 *M & S*. 283.

ANONYMOUS.

1814.

10th Feb.

LAWES, E. moved for a rule to shew cause why the proceedings should not be stayed till the plaintiff, who was resident in *Ireland*, should give security for costs; and in support of his motion he produced an affidavit that the defendant verily believed that he should establish a sufficient defence to the whole action. The defendant had paid money into Court, and pleaded.

Rule granted for proceedings to be stayed till plaintiff give security for costs, though after plea pleaded (a).

BAYLEY J. thought it too late to make the application, after plea pleaded.

Lawes referred to a late MS. case in the Common

(a) *Tidd*, 7th ed. The motion for obtaining security for costs should in all cases be made as soon as the defendant can reasonably do it after knowledge of the fact of the plaintiff's residence.

1814.

ANONYMOUS.

Pleas, where, though such a rule as this was discharged, it was made no objection that the motion was made after plea pleaded; and accordingly

THE COURT granted a rule *nisi*.

Lawes afterwards moved to amend his rule *nisi*, by making it part of the terms, that the money paid into Court might be detained in the hands of the officer of the Court as a security for the costs, and

BAYLEY J. said the rule might be so drawn up.

1815.

26th Jan.

ANONYMOUS.

If the plaintiff is a native of *England*, and departs for *France*, for a mere temporary absence, the Court will not compel him to give security for costs.

IN the course of last Term *Abbott* moved for a rule to shew cause, why the plaintiff, who was a foreigner, and resident in *France*, should not give security for costs; but the defendant not having then put in and perfected bail, the Court refused the rule (a); and now *Abbott* renewed his application on the same affidavit.

BAYLEY J. thought at first it was not a sufficient cause for having security.

But on *Abbot* observing that the plaintiff was a native of *France*, which differed materially from a native of *England* resident in *France* on a mere temporary absence,

BAYLEY J. concurred, and considered the grounds

(a) The defendant, if sued alone, must put in bail previous to the application. 4 T.R. 697. See cases cited in *Tidd*, 6th ed. 555. If the plaintiff be a foreigner, or native, and departs for a foreign country to reside there for a considerable length of time, the Courts will in general stay the proceedings till his return, or compel security to be given for the costs. 1 *Tidd*, 6th ed. 556, and the cases there collected.

sufficient to call on the plaintiff to shew cause why security should not be given; for it should be known whether the plaintiff was in *France* or not. 1815.
ANONYMOUS.

Rule *Nisi*.

BAYLIS *against* DYNELY.

1815.

20th April.

AN action was brought against several defendants, on a bond. Some of them pleaded pleas on which issue in fact was taken, and trial had, and verdict given for the plaintiff; and another defendant pleaded infancy; and, on demurrer to a replication of ratification after age, judgment was given for the defendants generally. The Master would not allow any costs to those defendants on whose pleas the trial had been had, and

Where in an action on a bond against several defendants, they sever in pleading and issue, as fact, and verdict for plaintiff against some defendants, and the other defendant pleads infancy and obtains judgment on a demurrer to a replication of ratification after age, the defendants who tried the issue are not entitled to costs (a).

Campbell now moved for a rule, calling on the plaintiff to shew cause why the Master should not review his taxation, and allow those defendants the costs.

BAYLEY J. refused the rule, and likened it to the doctrine, that where one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole declaration, and shews that the party had no cause of action, then, if the plea be found for the defendant who pleaded, he shall have costs; and being an absolute bar, the other defendants have the benefit of it, and do not pay costs; but where (as in this case) the plea does not go to the whole, but is merely in discharge of the party pleading it, there the other party shall not have the benefit of it, but shall pay the costs, though even a verdict be found against the plaintiff.

Rule refused.

1816.

26th Jan.

CURSUM *against* DURHAM.

Where the judge does certify that the cause was proper for a special jury, the party is only entitled to the costs actually paid to the attending jury in court: it is the constant practice not to allow more costs.

THIS action was for dilapidations. *Deacon* moved for a rule *nisi*, for the Master to review his taxation of costs, on two grounds; first, that he had not allowed the proper costs of a special jury, but only the sums which had actually been paid them; and secondly, that sufficient expences were not allowed for the witnesses. The judge had certified.

LORD ELLENBOROUGH C. J. at first thought that the act only allowed in such cases the money actually paid to the jurors: but upon referring to the statute, he and the Court were of opinion, that where the judge certifies the party is entitled to all the costs from which he is by the act excluded if the judge does not certify; and therefore here the party is entitled to all the costs of the special jury. Rule *nisi* on both grounds.

Deacon, on a subsequent day, moved that this rule might be absolute; whereupon

LE BLANC J. said, that he concluded there would be cause shewn; for if this rule should be made absolute, it would set aside the practice of this and all the other Courts, ever since the act, as they have all only allowed the costs paid in Court.

Rule absolute as to expences of witnesses, and discharged as to the costs of special jury, on the ground of the constant practice; though the Court seemed to think the words of the statute would bear the other construction.

ANONYMOUS.

1817.

Trinity Term.

CAMPBELL mentioned a case to the Court, as to the taxation of a bill of costs of an attorney; upon which

Independently of the statute as to taxation of costs, the Court still retains power at common law to order bills generally to be taxed.

BAYLEY J., **ABBOTT J.**, and **HOLROYD J.** all said, that though the statute as to taxation of costs applies only to particular cases, and bills of particular description, yet the Court still retains, and has always exercised a right, as at common law, to direct taxation of other bills of costs; such is the constant practice.

PEDLEY against FRAMPTON. (Exchequer.)

1816.

28th Nov.

MEREWETHER moved that the *postea* might be amended according to the indorsement by the associate. The action was in debt, on the statute of *Edw. 6.* for not setting out tythes, with counts for the single value, and the money counts. The cause was referred, and the arbitrator made no award, by the consent of both parties, but directed that the *postea* should be entered for plaintiff for treble value, 30s. The *postea* was entered as a general verdict for that sum; and the motion was, that after such amendment, the Master should review his taxation of costs, and that the defendant should bring the costs taxed into Court, and in the mean time proceedings should be staid. The objections were at first, that the *postea* should have been entered merely as a verdict on the first count, and no costs should of course be given plaintiff on the other counts; and that the plaintiff, on the authority of *Bernard v. Moss*, 1 *Hen. Bl.* 107. is not entitled under the statute of *Will. 3.* to costs, where the finding is by the award of an arbitrator, and not by a finding of a jury. He contended that an

Full costs in an action on statute of *Edw. 6.* for treble value of tythes not set out, where there was a verdict for plaintiff, subject to a reference, and the arbitrator directed a verdict to be entered for treble value, 1l. 10s.

1816.

PEDLEY
against
FRAMPTON.

arbitrator was not in the situation of a jury, as argued by *Laurence Serj.*, in — v. —.

The CHIEF BARON and WOOD, BARON, seemed to think otherwise. *Merewether* said that the argument did not avail in the case cited. He also contended, that it must be proved that the arbitrator was aware of this case, and that he intended to decide according to the justice of the case, and give plaintiff only the sum directed to be entered on the *postea*; and that he should not have the costs. He added, that by the consent of both parties, no award was made. *PEN CURIAM* (after some *consideration*) granted rule *nisi*, on 24th *January*, 1817. Cause was shewn by *Casberd*; and it appearing that a verdict was taken at the trial, the rule was *discharged* with costs.

1816.

15th June.

DAY *against* MEARNS.

An award of less than 5*l.* on the reference of a cause, brings it within the *London Court of Conscience* act (a).

THIS was an action against the defendant for the recovery of the sum of — *l.*; but before the cause came on to be tried, the parties referred it to an arbitrator (a), who afterwards awarded that the defendant should pay a less sum than 5*l.* to the plaintiff; and now

Campbell moved for a rule, calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, (under the stat. 39 & 40 *Geo. 3. c. 104.*) on the ground that the original cause of action did not exceed 5*l.*, and that the defendant was subject to the

(a) See 8 *East*, 289. 16 *East*, 161. By the 12th section of the statute 39 and 40 *Geo. 3. c. 104.* it is enacted, “that if any action or suit be commenced in any other court than the Court of Requests, for a debt not exceeding 5*l.* and recoverable by the action, &c. in the said Court of Requests, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs,” &c.

jurisdiction of the *London Court of Conscience Act*, at the time of the commencement of the action; and *Campbell* contended that the act was not confined to the recovering by verdict, for the words of the act were by "verdict or otherwise;" and for this he cited the case of *Dunster v. Day*, 8 *East*, 239.

1816.
DAY
against
MEARNS.

LORD ELLENBOROUGH C. J. said, that in that case it was tantamount to a verdict, and it did appear so in this. THE COURT, however, granted a rule *Nisi*.

ABBOTT J. doubted as to the form in which the rule should be drawn up, but said, as there was no verdict, that it should be to shew cause why the suggestion should not be entered on the roll; and why, upon payment of the sum awarded to be paid, without costs, the proceedings should not be staid; and

Campbell took his rule accordingly; and now (July 3) *Marryat* shewed cause against the rule; and

BAYLEY J. on the authority of *Holden v. Newman*, 13 *East*, 161. n. (a), pronounced the rule

Absolute.

BELL against BELSON.

1814.
26th Jan.

THE parties had entered into a submission to an award, of all matters in difference in law and equity, without mentioning any thing respecting costs. The arbitrators awarded their own expences to be paid out of the sum which they had awarded to be paid over by one of the parties.

If the submission to a reference mentions nothing respecting costs, the arbitrators have no power to award them to be paid by either party in particular (a).

(a) If no directions are given respecting the award, they are to be paid by both parties. 1 *Taunt.* 165. 12 *East*, 165. 2 *Tidd*, 6th ed. 874.

1814.

BELL
against
BELSON.

Puller now moved for a rule, calling on the defendant to shew cause why he should not pay the costs of the reference.

Sed per BAYLEY J. Can the arbitrators award costs to themselves?

LORD ELLENBOROUGH C.J. This has been a point so often settled that we cannot now entertain it. There is no doubt that the arbitrators cannot award their own expences under such a submission.

However, the COURT granted a rule *Nisi*, but which was afterwards discharged.

1815.

— against MYNDE.

8th May.

If a party obtain a rule for setting aside judgment and execution, on condition of his paying costs, the Court will not issue an attachment in the first instance for not paying those costs.

THE defendant in this case had signed judgment of *non pros.* and sued out an execution for the costs, and made a levy thereon. The plaintiff afterwards moved to set aside the judgment for irregularity, and obtained a rule *nisi*; but on shewing cause, the Court made the rule absolute, on condition that the plaintiff should pay the costs.

Lawes E. now moved that an attachment might issue in the first instance, for not paying the costs.

But the COURT said, that they could only grant him a rule to shew cause why the defendant or his attorney should not pay them; and added, that if they did not pay, or shew good cause why they did not pay them, they (the Court) would then make an order for them to do so; and should they disobey this, an attachment should immediately issue against them.

Rule *Nisi* on those grounds.

REX against GILBIE.

1816.

21st Nov.

THE defendant was indicted at the *Morpeth* sessions, for running stolen goods, and he removed the indictment by *certiorari* into the King's Bench, and the Court sentenced him to be imprisoned for a space of time in the gaol of *Morpeth*. The Master of the Crown Office, upon the taxation of the costs according to the statutes 5 and 6 *W. 3. c. 11. s. 3.* allowed the prosecutor the expences of carrying the defendant from the King's Bench prison down to *Morpeth*. *Chitty* now moved for a rule, calling on the prosecutor to shew cause why the Master should not review his taxation, and allow to the defendant those costs and expences attending his removal; and he intimated that he made the motion at the suggestion of the Master of the Crown Office, who thought it a question of some doubt, and fit to be discussed.

Where an indictment was removed by *certiorari* at the instance of the defendant, who was brought up in the King's Bench to receive sentence, being that he should be imprisoned in *Morpeth* gaol, Held, that the costs of sending thither should be taxed to the defendant.

ABBOTT J. considering it a question fit to be looked into upon the construction of the statute, granted a rule *Nisi*, and afterwards, in the same Term, it was made absolute.

REX against ———.

1814.

14th Nov.

KNOWLYS, Common Serjeant, moved, that it should be referred to the Master of the Crown Office to tax the costs of a *certiorari*, the prosecutor having removed the proceedings by *certiorari*, carried it down to trial, but afterwards withdrawn the record without notice thereof to the defendant.

Rule granted to refer it to the master of the Crown Office to tax, in favour of defendant, the costs of a *certiorari*, the record having been withdrawn without notice.

1814.

REX
against

LE BLANC J. Has this ever been done before? do they not form costs in the cause?

The Master of the Crown Office said not, and that it was usual to grant this rule.

Rule granted.

COVENANT.

COOPER *against* ROBINSON.

1818.

5th June.

THIS was an action of covenant for not paying taxes, and for not indemnifying the plaintiff, who was the purchaser of a lease, and in the deed of assignment the defendant covenanted to pay all taxes, and indemnify the plaintiff from them. There was a plea of set-off, and a demurrer to it, and joinder. *Manning* contended, that the amount of taxes must be certain, and an action of debt might have been brought for the same. *Chitty, contra*, was stopped

In an action of covenant for not indemnifying against taxes, no plea of set-off can be sustained.

PER CURIAM. The plaintiff might have brought an action of debt, but he was not compelled to do so. He is entitled to have damages for any injury which may have arisen from the non-payment of the taxes, and which damages must be ascertained by the jury. It cannot be taken as liquidated, and therefore there is no pretence for the set-off.

Judgment for the plaintiff

CRIMINAL INFORMATION.

1815.

30th May.**REX against WRIGHT.**

An affidavit to found a motion for a criminal information for a libel must distinctly negative the charge, unless the party libelled be abroad, or the charge be general.

THE Attorney-General moved for a criminal information, on the prosecution of Lord *Berkeley*, against the defendant, as the publisher of a *Sunday* paper, called the *Postscript*, charging the prosecutor with having ravished Lady *Deerhurst* at his own castle, during her honey-moon, he being intoxicated, and going into her room in the dark, where she received his embraces as her husband. The Attorney-General produced an affidavit of the prosecutor, negating the charges, in order to found his motion; the affidavit swore that the prosecutor did not go into her room against her will.

THE COURT thought that this was not a sufficient negative; and added, that they always require a direct negative, this being the constant rule, and always strictly attended to, except when the party was abroad, or the charge was so general that it cannot be answered.

LORD ELLENBOROUGH C. J. referred to *Rex v. Haswell*, and *Rex v. Bate, Dougl.* 387; and to a case where the party was charged with monopolizing the bread in *India*, and starving the people.

LE BLANC J. referred also to the *Brewers'* case, where the application was refused, because they did

not distinctly negative the charge; and he added, it was usual to do it in the words of the charge.

1815.

REX
against
WRIGHT.

Information refused till a better affidavit produced.

Afterwards (*June 8th.*) a rule *Nisi* was granted, on the prosecutor's producing better affidavits.

REX against HILBERS.

1818.

9th Feb.

MARRYAT shewed cause against a rule obtained by *Scarlett*, for a criminal information against the defendant for a conspiracy to raise the price of oil, by making fictitious sales, and monopolizing. He said the conspiracy was denied, and the monopoly, as here stated, was no offence at common law, and the statutes were all repealed.

On motion for criminal information against two persons for endeavouring to raise price of oil, it must appear distinctly that they combined together, as it is no offence for an individual separately so to endeavour.

PER CURIAM. What other person has been shewn to have been a co-conspirator? no one. In this case therefore there can be no conspiracy.

Rule discharged.

DECLARATION.

1820.

11th Feb.

M'QUICK *against* DAVIS.

It is irregular to serve the writ and the notice of declaration at the same time; but where the defendant omitted to take advantage of the objection until after judgment was signed, and a whole term had elapsed, the Court would not set aside the judgment with costs (a).

MOTION to set aside judgment for irregularity, first, that there was no personal service of the writ on the defendant; and, second, that the notice of declaration, and the copy of the writ, were both served at the same time. In *June* last the action was commenced against the defendant, who is a sheriff's officer, and the writ and notice of declaration were served on the same day, at his house. The defendant immediately served the plaintiff with a notice of this irregularity, but notwithstanding which the plaintiff proceeded, and filed common bail. Both parties lay by until the 1st of *January* last, when the plaintiff signed judgment, and on the 16th of that month he executed a writ of inquiry, and in this Term the plaintiff applied to set aside the judgment.

Peake, Serjeant, for the plaintiff, and *Wilde* for the defendant, contended, on the one hand, that the defendant was guilty of laches, in coming so late to the Court with the objection stated, and therefore he could not be relieved; and on the other hand, that the plaintiff was entitled to no indulgence, in having gone on with the proceedings after he had been apprized of the irregularities complained of.

THE COURT thought the plaintiff's judgment was irregularly signed; but it must be set aside without costs, the defendant undertaking to appear and plead forthwith.

Rule absolute, without costs.

HILL against PARKER.

1815.

7th June.

E. LAWES shewed cause against a rule of *Abbott*, to set aside a declaration and subsequent proceedings, for irregularity, in serving the copy of the writ and notice of declaration at the same time. The service was in last *Hilary* Term, and nothing further was done till the notice of enquiry in vacation after *Easter* Term, and this rule was obtained the fourth day of this Term. It was contended, that the defendant was too late in this application.

A notice of declaration served with a copy of a writ, is bad, and the defendant is in time to take advantage of it if he comes to the Court immediately after the next step the plaintiff takes.

Abbott, contra, said, that they were not obliged to take it for granted that they were proceeding upon this bad notice, and that they were in sufficient time if they came to the Court immediately after the next step they took upon such notice.

BAYLEY J. assented, and said, that they were not to assume that the plaintiff would proceed on a notice which was in fact a nullity. But the declaration was good, and therefore, as to that, the rule must be discharged. But as to the remainder,

Rule absolute, but without costs, for the defendant obliged the plaintiff to come here, having moved to set aside more than was objectionable.

ANONYMOUS.

1815.

6th June.

ABBOTT shewed cause against a rule of *Reader*, for setting aside a judgment. He admitted that there was on the face of the affidavit a ground to set aside the declaration, as being delivered in chief before the common appearance was filed; but he said,

Judgment set aside for irregularity, in filing declaration in chief before appearance.

1815.
ANONYMOUS.

as the motion was to set aside the judgment, the Court would not do that, though they might have set aside the declaration if the motion had been put in that shape.

LE BLANC J. The motion should have been to have set aside the declaration, and all proceedings thereon; by moving to set aside the judgment they cannot afterwards move to set aside the declaration, and therefore they have affirmed that; but as the Court sees the foundation of the judgment is wrong, they must set it aside.

Rule absolute.

1814.

CAMPBELL *against* PALMER.

26th Nov.

Serviceable
process in tres-
pass and assault,
and the decla-
ration in trover,
the variance is
not material.

LONG moved to set aside proceedings, for variance between writ and declaration. Two writs had been issued, one bailable in *assumpsit*, the other not bailable, but requiring defendant to answer in a plea of trespass and assault, and one declaration was delivered in *assumpsit*, the other in *trover*. He contended that the latter was a variance from the writ in trespass and assault, and cited the *dictum* in *Triving v. Jones*, 5 T. R. 462.

BAYLEY J. If no declaration, by the bye, was filed till the end of the second Term, the plaintiff may declare in any form of action. In cases of all bills of *Middlesex* for trespass, if this motion was granted they could not sue in *assumpsit*, which is every-day's practice.

Motion refused.

DISTRESS.

JENNER against YOLLAND. (*In Exchequer.*)

1818.

26th May.

ON a former day a rule had been obtained by *Pell*, Serjeant, *Gaselee*, and *Wylde*, to shew cause why a verdict for the defendant in this case should not be set aside, on the ground of misdirection of the Judge to the Jury. It was an action for taking beasts of the plough for a distress, whilst there were other things. And on the trial *ABBOTT J.* left two points to the jury : *First*, whether the defendant, by due diligence, could have known that there was sufficient distress, without taking beasts of the plough. *Secondly*, whether the sale was fair, and for the best prices. *Pell*, Serjeant, abandoned the second point.

Landlord distraining beasts of the plough, not liable, if he has used due diligence to ascertain whether sufficient distress without. Landlord not to be affected by subsequent sale at higher price than was expected.

Williams now shewed cause; and cited 51 *Hen.* 3. and 1 *Burr.* 583. The sale was not the question. It was the taking every thing on premises, and it should have been proved that there was a very considerable excess. [GARROW B. In cases for excessive distress, Lord ELLENBOROUGH C. J. always considered that the landlord might take things which could be got together, rather than those of a bulky nature, which could not be divided.] *Williams*. The property taken must be sold in the ordinary way.

Adams, on same side. The sale was not the *gravamen*. The question was, whether a person who took the distress, had reasonable ground to think the goods alone were sufficient. If enough had not been taken, and a second distress was made, there would have been an action. If otherwise, the propriety of the distress would depend upon extraneous circumstances. There

1818.

 JENNER
against
 YOLLAND.

is no authority to shew that you must begin the sale with any particular article, or sell any particular thing last.

BAYLEY J. There were only 14*l.* surplus, according to the estimation of defendant's neighbours. No landlord would take beasts of the plough, if his right so to do was to depend on future circumstances.

Gaselee, contra. The sale was the *gravamen* by law, and was sufficiently averred in the declaration. The sale was the *gravamen* under the stat. of *Will. 3.*; for if the landlord sells under that statute what he could not take under the former statute, he is liable to an action.

GARROW B. The declaration concludes against the form of the *statute*, in the singular.

Gaselee. The sale was, at all events, evidence to shew that the distress of beasts of the plough was unnecessary; there was an excess of 75*l.*; the beasts of the plough were sold for only one quarter of that sum.

Wylde, on the same side. It is a question if the landlord is discharged, by shewing he acted on the opinion of persons in whom he confided; and whether the sale was evidence of an excess. No extraordinary prices at the sale were shewn to have been given, and yet there was a great overplus. As notice to the landlord of the value of the goods is not necessary, due diligence is no answer to the first question.

WOOD B. The whole question is on the first count, whether it was found or not. It is said that the sale is sufficient to support the evidence of an excessive distress, but that is not sufficient unless the distress it-

self was illegal; that is the only question. I think the distress was properly made: whether there was other distress does not depend upon subsequent events, as a sale at a high price. The true construction is, I think, according to fair price, in fair judgment, at the time of the distress. So the direction was, whether there was reasonable diligence used in the estimate, and I think it right. On the estimate it does not appear there was sufficient property without beasts of the plough. The rent was 194*l.* The appraisement on oath was 211*l.*, being 13*l.* or 14*l.* more than the rent. It has been said there might be a second distress: that is, if all was sold; and in the mean time the tenant might drive the cattle away.

1818.

 JENNER
against
 YOLLAND.

GARROW B. I am of the same opinion. The evidence was left to the jury, and the direction of the judge was correct. The jury have found that the distress was reasonable. The direction is objected to, first, that the distress was at the landlord's peril, and he was liable, if the excess were shewn by future events; I think it a fair construction, that reasonable diligence is sufficient. 2dly. It was said that beasts of the plough must be sold first; there is nothing in the statute to shew that there must be a second sale, but if that is so, no landlords will ever take beasts of the plough; and before a second distress is made they may be driven away, or a judgment creditor may seize them. In this particular case, when the distress was taken, the value of farming stock was very low, and the sales under the distress were particularly so. The defendant bid himself, and improved the sale. The auctioneer says there would have been a difficulty to raise the rent without the beasts of the plough. I think the verdict right, and that the parties acted *bona fide*.

Rule discharged.

EJECTMENT.

DOE ex dem. HAMMEK and CORPORATION of PLY-
MOUTH against FILLIS.

1818.

10th Feb.

Verdict in
 ejectment on a
 count on a sup-
 posed demise
 by a party,
 without his au-
 thority, and
 without his
 concurring in
 the action, set
 aside (a).

IN this ejectment on several demises, the plaintiff obtained a verdict only on the first demise, stated to have been made by the corporation of *Plymouth*. At the trial, evidence was given that the corporation had given no authority for their names to be used; and on this ground, and on an affidavit that no such authority had been given, *Pell*, Serj. obtained a rule to shew cause why the verdict should not be set aside.

Casberd now shewed cause, and relied on the case of *Doe ex dem. Fine and others v. Figgins and another*, 3 Taunt. 440 (a).

THE COURT, however, distinguished that case from the present, and said that certainly the want of authority was sufficient to set aside the verdict, provided the affidavit to ground the motion clearly proved the want of such authority. The affidavit being sufficiently positive and certain in this respect, the Court pronounced the rule

Absolute.

(a) In *M. T.* 1817, in an ejectment on demise of *Hansell* and of Corporation of *Plymouth*, after verdict for plaintiff, the Court of King's Bench stayed judgment, on affidavit that the Corporation had not given consent to use their name. *Bowden*, attorney, *Aldermanbury*, 11th Jan. 1817.

DOE dem. SHEPHERD and another, against ROE.

1820.

23rd Feb.

CHITTY moved, on a former day, for a rule *nisi*, why the name of one of several lessors of the plaintiff, who was beneficially interested in the estate, as a co-heir in gavelkind, should not be struck out of declaration, he having been made co-lessor without his consent, and without any tender of indemnity : such lessor swore to these facts.

If a person be named in a declaration in ejectment as one of the lessors of the plaintiff, without his authority, the party served with declaration may, before appearance, move the Court to have such party's name struck out of declaration.

Campbell opposed the motion, on ground of its being premature, before appearance, and that it did not appear that motion was on behalf of such lessor.

HOLROYD J. It is proper to move before appearance ; and as lessor swears, that shews the motion is on his behalf.

Rule absolute.

DOE dem. THOMAS against ROE.

1814.

11th Feb.

KING moved for judgment against the casual ejector, stating that the declaration was by original, and the notice at the foot thereof was not " wheresoever, &c." but as in proceedings by bill in the K. B. ; and referred to *Doe v. Hazlewood*, 3 T. R.

Judgment granted against the casual ejector when the declaration was by original, and the notice was as if by bill, omitting " wheresoever, &c." and it was held immaterial.

PER CURIAM. It is sufficient.

Judgment against the casual ejector.

ANONYMOUS.

GASELEE applied for judgment against the casual ejector, where notice had been given by mistake, for *Hilary* instead of *Trinity* Term, but the tenant in possession was afterwards informed of the mistake.

1814.

15th June.

Rule nisi for judgment granted against the casual ejector where the notice was in the wrong term, but the tenant in possession afterwards knew of the mistake.

Rule Nisi.

1815.

6th Feb.

GOODTITLE *dem.* RANGER against ROE.

Declaration, intitled of *Mick. Term*, 54 *Geo. 3.* instead of 55 *G. 3.* but notice dated 11th *Jan.* 1815, requiring tenant to appear "next *Hilary Term*," held sufficient.

MACKANESS moved for judgment against casual ejector. The declaration was entitled *Michaelmas Term*, 54 *Geo. 3.* instead of 55 *Geo. 3.* and the notice to appear was dated 11th *January*, 1815, requiring the tenant in possession to appear "in next *Hilary Term*." This mistake, it was submitted, was not material.

LE BLANC J. ruled that the declaration was sufficient, and consequently

Rule absolute.

1820.

11th Feb.

DOE against GREAVES.

The notice to appear being in "Trinity Term next," instead of "Hilary Term next," judgment was allowed against the casual ejector.

BOWEN moved for judgment against the casual ejector, and mentioned, that the notice at the foot of the declaration required the defendant to appear in *Trinity Term* next, instead of *Hilary Term* next; contending, that as it was a mere clerical mistake, the tenant in possession could not be deceived.

HOLROYD J. (a) was of opinion, that the error would not vitiate the proceedings, and therefore granted a rule for judgment.

The only judge in Court

1815.

14th Nov.

ANONYMOUS.

A wrong title of the Term in a declaration in ejectment, is an immaterial error.

MARRYAT moved for judgment against the casual ejector, on an affidavit of the sufficient service of the declaration. The declaration was entitled *Trinity Term*, 56 *Geo. 3.* which had not yet arrived, and

there was no date to the notice further than that of the service thereof. However,

1815.

ANONYMOUS.

LE BLANC J. thought it an immaterial error.

Rule absolute.

ANONYMOUS.

1816.

27th Jan.

W. E. TAUNTON moved for judgment against the casual ejector, on the usual affidavit of service. The declaration was entitled as of *Hilary*, instead of *Michaelmas* Term, but the notice to appear was right.

Judgment granted against the casual ejector, where the declaration was entitled by mistake of a wrong Term.

BAYLEY J. thought the mistake immaterial.

Rule absolute.

ANONYMOUS.

1817.

29th April.

CROSS moved for judgment against the casual ejector, on the affidavit of sufficient service. The title of the declaration was as of *Michaelmas*, instead of *Easter* Term, but the Term in the notice was right.

If the title to a declaration in ejectment is wrong, and the notice to appear there-to is correct, the defect in the title is cured.

THE COURT said that it was an immaterial mistake, since the notice was correct ; and granted judgment.

ANONYMOUS.

1816.

20th Jan.

ADAMS moved for judgment against the casual ejector. The declaration stated that *J. Mills* (the real defendant) was attached to answer, &c. and then went on, and used the name of the casual ejector throughout the remainder of the declaration.

Judgment granted against the casual ejector, though the real defendant's name was inserted at the beginning of

the declaration, instead of the casual ejector. But the party should amend.

1816.

ANONYMOUS.

HOLROYD J. You may have judgment, but it is worth your consideration whether it will not be advisable for you to amend; for though, if the defendant does not appear, this will be immaterial, yet if he does, he may set aside your proceedings.

1820.

12th Feb.

DOE *on the dem. of* PHILLIP WORTHINGTON and JAMES WORTHINGTON *against* BUTCHER.

The declaration in ejectment was intitled "*Doe on the demise of A. and B. v. B.*" and the affidavit of the service of the declaration upon the tenant in possession was entitled "*Doe on the demise of B. & A. v. B.*" and the Court, notwithstanding the variance between the arrangement of the lessors' names, gave judgment against the casual ejector.

ADAMS moved for judgment against the casual ejector in this case, and thought it necessary to mention a peculiarity in the proceedings, before the rule for judgment was drawn up. The title of the cause in the declaration was "*Doe on the demise of Phillip Worthington and James Worthington v. Butcher;*" and in the affidavit of the service of the declaration, the cause was entitled "*Doe on the demise of James Worthington and Phillip Worthington v. Butcher,*" merely changing the order of the names of the lessors of the plaintiff from that in which they stood in the declaration.

THE COURT said it was a mere clerical mistake, and ordered the rule for judgment to be drawn up.

1815.

19th June.

DOE *dem.* FIELD *against* ROE.

Service of a declaration in ejectment on one of two joint-tenants who were also copartners in trade, is not sufficient to entitle the plaintiffs to judgment against the casual ejector in the first instance, but there must be a rule to shew cause (a).

LITLEDALF moved for judgment against the casual ejector. There were two tenants in possession, being joint tenants and copartners in trade: service of the declaration was good as to one, but the other had not been served at all; and *Littledale* contended that it was unnecessary, as the service of one was suf-

ficient to entitle the plaintiffs to judgment against the casual ejector in the first instance, but there must be a rule to shew cause (a).

sufficient; for if they were only joint tenants it would have been sufficient for a rule *nisi*, but where they are copartners in trade they are entirely of the same interest, and the plaintiff is therefore entitled to a rule absolute in the first instance.

1815.

Doe dem.
FIELD against
ROE.

BAYLEY J. We can only look to the joint interest in the estate as joint tenants.

Judgment against one, rule to shew cause at Chambers as to the other.

RIGHT *ex dem.* against WRONG.

1817.

7th Jan.

BAYLEY, R. moved for judgment against the casual ejector, on an affidavit that the declaration had been served on one of three persons who were all tenants in possession, without naming them as joint-tenants, or tenants in common; and *Bayley* contended that it was unnecessary so to state them, because, being in possession generally, and not of separate parts of the premises, the inference was that they were joint-tenants, and the defendant could not swear to their mesne interest in the premises; and he cited the case of *Doe ex dem. Bailey v. Roe* (b), where, under similar circumstances, the affidavit only stated that the three defendants were in possession of the premises; and he read LORD EYRE C. J.'s judgment.

A rule *nisi* for judgment against the casual ejector, where the service was on one of three tenants in possession, and the affidavits did not state them to be joint-tenants (a).

LORD ELLENBOROUGH C. J. thought the service upon one of two persons in possession was sufficient, and he granted a rule *Nisi*.

(a) The affidavit must shew that they are all in possession. 1 *Chitty's* Repts. 141.

(b) 1 *Bos.* and *Pul.* 369.

1814.

27th Jan.

Rule *nisi* granted where the service was on one of two joint-tenants.

ANONYMOUS.

TINDAL moved that the service of a declaration in ejectment on one of two joint tenants in possession should be deemed 'good service, and he cited the case of *Doe ex dem. Bailey v. Roe*, 1 B. & P. 369.

BAYLEY J. granted a rule *Nisi* (a).

(a) The rule for judgment in the case in 1 B. and P. 369, absolute in the first instance. The tenant himself must be served, and not the servant. 1 Chitty's Rep 121.

1814.

22d June.

Though service of a declaration in ejectment on one of three several defendants is not sufficient, judgment will be granted against the other two.

DOE ex dem. MURPHY against MOORE, and others.

COMYN moved for judgment against the casual ejector. There were three defendants, who held severally. The service (as appeared by the affidavits produced) was perfect as to two, but imperfect as to the other. *Comyn* therefore moved for judgment against the two only.

And the COURT granted the rule for judgment

1818.

6th Nov.

DOE dem. BATSON against ROE.

The affidavit in support of the rule for judgment against the casual ejector, where the tenant keeps out of the way, should state the belief of the deponent that he kept out of the way to avoid being served.

CASBERD moved in an action of ejectment for a rule for judgment against the casual ejector. It appeared that the tenant in possession kept out of

(b) Where the tenant absconds or keeps out of the way to avoid being served, the copy of the declaration should be delivered to one of his family; or if there be no one in possession, may be affixed on some conspicuous part of the premises. *Tidd. Prac.* 6th ed. 509. Any peculiarity in the service of the declaration in ejectment should be mentioned to the Court on moving for judgment against the casual ejector. The general rules respecting the affidavit of service of the declaration, will be found detailed in *Adams on Ejectment*, 2nd ed. 213.

the way, and could not be served with the declaration; but the affidavit upon which the motion was grounded did not state any reason for the tenant's keeping out of the way, or that he did it to avoid being served.

1818.

*DOE dem. BAR-
SON against
ROE.*

ABBOTT J. expressed an opinion, that the affidavit should state the *belief* of the deponent, that the party kept out of the way to avoid being served with the declaration in ejectment.

Rule refused, in order that the affidavit might be amended.

DOE dem. LOWE against ROE.

1814.

14th April.

CRoss moved for judgment against casual ejector, on an affidavit which stated that the declaration was stuck up upon the house; that no one was in the house, and that the neighbours believed the tenant had absconded.

Judgment as against casual ejector, where no one in the house, must state in the affidavit that the party has absconded *with view* to avoid the service, or at least, must swear to his belief of it.

DAMPIER J. It is not sufficient to swear that no one was in the house. If there was a vacant possession the party must proceed as such; but almost any matter will suffice to prevent a vacant possession. The affidavit should go on to state that the deponent believes the tenant has absconded to avoid being served, in which case you may have judgment against the casual ejector.

Rule refused.

ANONYMOUS.

1813.

23rd Jan.

BARLOW moved for a rule to shew cause why the service of a declaration in ejectment should not be good, stating that the tenant kept out of the way, &c. is insufficient, unless it swear that the person serving the declaration searched for the defendant, and could find him no where (a).

An affidavit to ground a motion that the tenant kept out of the way, &c. is insufficient, unless it swear that the person serving the declaration searched for the defendant, and could find him no where (a).

(a) See *ante*, 176, note. Service of a declaration in ejectment, by leaving
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1813.

ANONYMOUS.

be deemed sufficient, and also^d that the Court should direct that the service of the rule on the premises should be deemed good service. The affidavit to ground the motion stated, that the tenant in possession had deserted the premises fifteen months, that the declaration had been served on the tenant's servant maid on the premises, and that the nature of the declaration had been explained to her; but the affidavit did not proceed to state that the person serving the declaration had searched for the tenant and could not find him, or did not know where he could be found, &c.

BAYLEY, J. said it was insufficient.

Rule refused.

it with a servant of the tenant in possession, is bad, for want of an acknowledgment that the servant had received it. 1 *Chitty*, 100; and see *post*, 187. Where the tenant keeps out of the way to avoid being served, it will be sufficient to deliver a copy of the declaration to one of his family; or if there be no one in possession, it may be affixed on some conspicuous part of the premises. *Adams on Ejectment*, 2nd ed. 210. *Tidd*, 6th ed. 509, 510. *Bornes*, 172.

1816.

21st Nov.

DOE *ex dem.* HELL *against* ROE.

Rule *mis* and afterwards rule absolute for judgment against the casual ejector, where the house was shut up and no tenant was in possession, and the declaration was stuck up on the most conspicuous part of the premises.

E. LAWES moved for judgment against the casual ejector, on an affidavit swearing that for some days previous to the service of the declaration, the premises in dispute were shut up, and no body was there; and that on the 2d Nov. 1816, a copy of the declaration was fixed on the door of the house, being the most conspicuous part of the premises; and *E. Lawes* referred to *Fenn ex dem. Buckle v. Roe*, 1 New Repts. 293.

ABBOTT J. granted a rule *mis*, as it was so done in that case; and he added, that the service of the rule should be made in the same manner as the declaration,

and that it should be deemed good service, unless the tenant should be found.

Rule *Nisi*, afterwards absolute.

ANONYMOUS.

1816.

14th Nov.

BOLLAND moved for judgment against the casual ejector, on an affidavit, that the tenant in possession being out of the way, and as no access to her could be obtained, except a reference to her attorney, application was made to him, and he directed that the declaration should be sent by the twopenny post to the tenant's last place of abode, which was done accordingly. The affidavit also swore, that service had been made on the premises, on a person whom the deponent believed to have been left there by the tenant in possession, and also on the attorney.

AUBOTT J. granted a rule *nisi*, and afterwards the rule was made absolute.

Rule absolute for judgment against the casual ejector, where the service of the declaration had been made on a person believed to have been left in possession by the tenant, who was out of the way, and also on her attorney; and a letter sent by the two-penny post, according to the attorney's direction, to the tenant's last place of abode.

DOE *ex dem.* ATKINS *against* ROE.

1816.

8th Nov.

TINDAL moved for judgment against the casual ejector. The tenant in possession was dead. He had no wife at the time of his death, and no administration had been taken out: his goods were in the house, and his servant was in possession. The notice to the declaration was addressed to the tenant in possession, or his personal representative; and the service thereof was on the servant in possession.

HOLROYD J. I think it is insufficient; you must take some other course; you perhaps had better endeavour to get possession, and if the servant who is in

Where the tenant in possession is since dead, and his late servant is in possession, the plaintiff had better endeavour to get possession; and if the servant who is in possession resists, then treat him as tenant, and serve the declaration on him as such; and if he does not then resist, perhaps it may be treated as a vacant possession.

1810.

DOE ex dem.
ATKINS against
ROE.

possession resists you, you may then treat him as tenant, and serve him with a declaration, with notice addressed to him; and if he does not resist you, perhaps you may then treat it as a vacant possession.

Tindal. Perhaps service on the solicitor of the deceased would be sufficient.

HOLROYD J. I think not.

Rule refused.

1815.

7th June.

DOE dem. TINDALE against ROE.

An acknowledgment by the defendant of the receipt of the declaration is not sufficient to entitle the plaintiff to judgment against the casual ejector, unless it be sworn that the admission was before the essoin day.

CASBERD moved for judgment against the casual ejector, on an affidavit that the house was vacant, and the notice was stuck upon it, and the defendant subsequently admitted that he had received it. But it did not state that the admission was before the essoin day.

BAYLEY J. thought it insufficient, and he would not grant a rule *nisi*, saying it had been refused this Term before.

1814.

5th Feb.

RIGHT dem. FREEMAN against ROE.

Service of a declaration in ejectment on a brother of the tenant in possession is bad, for want of an acknowledgment by the tenant that he had received it (*a*).

SPANKIE moved for a rule to shew cause why judgment should not be entered up against the casual ejector, on an affidavit that service of the declaration was made on a brother of the tenant in possession on the premises, but the tenant had made no acknowledgment of a receipt thereof.

BAYLEY J. said, that as there had been no acknow-

(a) So where the service was on a servant. 1 Chitty's Rep. 100

ledgment, he could not even grant a rule *nisi*. The circumstance of the party served being the brother of the tenant in possession, affords no legal ground for presuming that the latter received it.

Rule refused.

1814.

RIGHT *dem.*
FREEMAN
against
ROE.

ANONYMOUS.

1814.

3d Feb.

RICHARDSON moved that the service of a declaration in ejectment, on the clerk of a public body (an act of parliament having directed the clerk to be appointed) should be deemed good service.

BAYLEY J. granted a rule *nisi*; but

Richardson, on looking at the affidavit, observed that it was entitled with the names of the real defendants, instead of *Richard Roe*; and

BAYLEY J. said that it was then no affidavit in the cause at all, and if the rule *nisi* was to stand, the plaintiff might be turned round.

Richardson said he would amend his affidavit.

Rule *nisi* granted to make the service of a declaration in ejectment on the clerk of a public body (the clerk having been directed to be appointed by act of parliament) good service. The affidavit to ground such a motion must not be entitled in the real names of the defendants.

ANONYMOUS.

1816.

28th June.

NOLAN moved for a rule to shew cause why service of a declaration in ejectment should not be deemed good service, on an affidavit that it had been served on an attorney who represented himself to be the agent of the tenants in possession, and who desired the person serving it not to trouble the tenants, but to give it to him and he would appear for them. *Nolan* also moved that the service of the rule on the attorney should be good service.

THE COURT granted a rule *nisi*, which might be served as moved for.

Rule *nisi* granted for judgment against the casual ejector where service of the declaration was made on an attorney, who represented himself to be the agent for the tenants in possession, and would appear for them.

1813.

1st July.

ANONYMOUS.

The Court will in the first instance only grant a rule nisi for judgment against the casual ejector, where the affidavit does not swear that the import of the declaration was explained to a servant to whom it was delivered (a).

COUNSEL moved for judgment against the casual ejector, on an affidavit that the person serving the declaration went to the premises of the tenant in possession, and there found her ill in bed up stairs, but she said she could not come down stairs to receive it; the declaration was then served on the servant maid to carry it to her mistress; she did so, and returned, saying that she had delivered it to her. The affidavit, however, did not state that it had been explained to the servant, or that she had been desired to explain it to her mistress, or that she had so explained it.

BAYLEY J. on account of this defect in the affidavit, said that he must only have a rule to shew cause.

Rule Nisi.

(a) The contents of a declaration in ejectment should be explained at the time to the party on whom the declaration is served. *Adams on Ejectment*, 200.⁴

1815.

14th Nov.

ANONYMOUS.

Rule granted to shew cause why the service of a declaration in ejectment on a son of the tenant in possession, who said that his father was unable to attend to any business, and that a person representing herself to be the wife of the tenant in possession, and whom the deponent verily believes was such (b), called at the office of the deponent, and a subsequent admission by a person whom the deponent believed was the wife of the tenant in possession, that her husband had received it, should be deemed good service.

ROSS moved for judgment against the casual ejector, on an affidavit that the declaration was served on the son of the tenant in possession, who said that his father was unable to attend to any business, and that a person representing herself to be the wife of the tenant in possession, and whom the deponent verily believes was such (b), called at the office

(b) An affidavit of the service of a declaration in ejectment on a woman representing herself to be the wife of the tenant in possession, not stating deponent's belief that she was so, is insufficient. *Doe dem. Simmons v. [illegible]*

of the plaintiff's attorney afterwards to settle the business, and admitted that the tenant in possession had been served with a declaration (a); and the affidavit swore that such admission was made before the essoign day.

1815.

ANONYMOUS.

LE BLANC J. thought it insufficient service, but granted a rule calling on the tenant to shew cause why it should not be good service.

Rule *Nisi*.(a) See 1 *Chitty's Rep.* 121.DOE *ex dem.* LORD AYLESBURY *against* ROE.

1814.

8th Feb.

D. JONES moved for a rule to shew cause why judgment should not be signed against the casual ejector, on an affidavit that service of the declaration had been made on one A. B., who had the care of the person, and the management of the affairs, of the tenant in possession, who was a lunatic; and D. Jones asked if the rule to shew cause should not be directed to the said A. B., and that it was so done in the case of *Doe v. Roe ex dem. Wright, Barnes*, 190.

Judgment against the casual ejector, where the service of the declaration was made on a person who had the care of tenant in possession (a lunatic) and the management of his affairs, though not appointed by a regular committee.

BAYLEY J. There the person was appointed by a regular committee; it does not appear to be so here, and the rule must be generally to shew cause, and it is not necessary that it should be directed to any particular person.

N. B. The rule *nisi* in such a case should be generally to shew cause, without being directed to any party in particular.

Rule *Nisi*, afterwards absolute.

1815.

1st Feb.

DOE *dem.* AKINS *against* ROE.

Rule absolute for judgment against the casual ejector, where rule *nisi* was served on the servant of the tenant in possession on the premises, which were locked up, and nobody in them, except the servant, who had the keys of the premises, the declaration having been served on the servant under nearly the same circumstances.

A RULE had been obtained to shew cause why judgment should not be signed against the casual ejector, on an affidavit that service of the declaration had been made on the servant of the tenant in possession on the premises, which were shut up, and nobody in them, except the servant who had the keys of the premises; and a copy of the declaration was also stuck upon some conspicuous part of them.

Gifford now moved to make the rule absolute, on an affidavit that the rule *nisi* had been served on the servant; the circumstances being just the same as when the declaration was served, except that since the service of the declaration, the servant had given some of the keys to a friend of the defendant.

BAYLEY J. thought the service sufficient.

Rule absolute.

1815.

26th May.

ANONYMOUS.

Rule *nisi* granted for judgment against the casual ejector, where it appeared from circumstances that the parties understood the contents of the declaration, though the affidavit did not state that it was explained to them (a).

PARKE moved for judgment against the casual ejector, on an affidavit that the person serving the declaration went to the house and found it shut up, and the tenant in possession looking out of the window, said he knew what the declaration was; the person serving it then read it to him, and knocked at the door, and the wife came to the door but would not open it, and said that the declaration could not be served when the house was shut up, and that the notice was not a good one.

(a) In general the notice should be read over and explained to the party served. *Tidd*, 7th ed. 505.

DAMPIER J. thought at first that the service was not sufficient, as the affidavit did not state that the declaration was explained to them. But afterwards, concluding from the above facts that they knew what it was, he granted a rule *nisi*.

1815.

ANONYMOUS.

WRIGHT *ex dem.* BAYLEY *against* WRONG.

1817.

23d Jan.

BAYLEY R. moved for judgment against the casual ejector, on an affidavit that the tenant in possession was in *Newgate*, and the person serving the declaration saw him there, but he refused to take the declaration, which was pushed through the iron grating to him, and in his presence; and Bayley cited the case of *Farmer v. Mills, Barnes*, 180.

Rule *nisi* granted for judgment against the casual ejector, where the declaration was pushed through an iron grating to the defendant, who was in *Newgate*.

HOLROYD J. granted a rule *Nisi* only, observing that the defendant might controvert the facts.

ANONYMOUS.

1816.

22d June.

WALFORD moved for judgment against the casual ejector, on an affidavit that the declaration was put down on a table in the house, in the presence of the tenant in possession, and was explained to him; but it was not given to him, because a son of the tenant stood between the person endeavouring to serve the declaration and the defendant, and prevented him from serving it.

Judgment against the casual ejector, where the declaration was put on a table before the defendant, but could not be delivered to him, as the defendant's son prevented the person from serving it.

HOLROYD J. said this was sufficient.

Rule absolute.

1816.

2nd July.

DOR *dem.* THOMPSON *against* ROE.

Judgment granted against the casual ejector, where the declaration was not read over or explained to the tenant in possession on whom it was served, but who subsequently acknowledged that he had received it, and knew what it was.

FLANAGAN moved for judgment against the casual ejector, on an affidavit, amongst other things, stating that the service of the declaration was personal, though it had not been read over or explained to the defendant. It was sworn, however, that the defendant had made a subsequent acknowledgment that he had received the declaration, and knew what it was.

LORD ELLENBOROUGH C. J. It is sufficient.

Rule absolute.

1813.

19th June.

ANONYMOUS.

The Court will in the first instance only grant a rule *nisi* for judgment against the casual ejector, where the motion is grounded on an affidavit of the defendant's acknowledgment, that he had endeavoured to avoid the service of the declaration (a).

MENCE moved for judgment against the casual ejector, on an affidavit that the deponent who served the declaration went to the premises, and there saw the defendant in his garden, about twenty yards from the house; he then went to the front door of the house, and there saw his daughter, a girl about nine years old, who said that her father was not at home; he then saw the defendant at the back door, and immediately went there, but was again told that the defendant was not at home, upon which he left the premises; that application was again made at a subsequent time, and the person serving the declaration was again told the defendant was out, and thereupon he left a copy of the

(a) Where there is any thing in the service of a declaration out of the common way, it should be mentioned to the Court on moving for judgment against the casual ejector; and if they are satisfied that the tenant has had notice of the declaration, they will make the rule for judgment absolute in the first instance; but otherwise they will grant a rule upon the tenant to shew cause why the service should not, under the special circumstances, be deemed sufficient, and direct that the service of the rule on the premises shall be deemed good service. *Tidd*, 7th ed. 506, 7, and the cases there cited. And see *ante*, *Tindale v. Roe*, 180.

declaration on the premises ; the affidavit then swore that the defendant, after the essoign day, had acknowledged that he had kept out of the way with the intention to avoid being served, but it did not proceed to state that the defendant had received it before the essoign day of the Term.

1820.

ANONYMOUS.

BAYLEY J. You must take a rule *nisi* only, for your application is founded on the acknowledgment of the defendant, which he must have an opportunity of answering.

Rule *Nisi*.

ANONYMOUS.

1813.

28th June.

E. LAWES moved for judgment against the casual ejector, on an affidavit that the defendant's attorney had acknowledged that he had received the declaration from his client.

The Court will in the first instance only grant a rule *nisi* for judgment against the casual ejector, where the defendant's attorney has acknowledged the receipt of the declaration from his client (a).

LE BLANC J. said that such an acknowledgment was not necessarily sufficient to fix the principal, and that it could only be a rule to shew cause.

Rule *Nisi*.

(a) 1 Bos. & Pul. 384. 1 Chit. Rep. 121 ; ante, 178. 180.

ANONYMOUS.

1814.

28th Jan.

GASELEE moved for judgment against the casual ejector, on an affidavit that service of the declaration on the tenant in possession, the latter having afterwards acknowledged the receipt thereof, is sufficient ; but the affidavit to ground the motion for judgment should state when such acknowledgment was made (b).

Service of a declaration in ejectment on a

(b) The service of a declaration in ejectment, before the essoign day of the Term, on the daughter of the tenant in possession, in the absence of him and his wife, was held insufficient in the King's Bench, even though the tenant had since declared that he had received the same, on the ground that it did not appear that he had received it before the essoign day. 13 East, 441. Ante, 120, Tindale v. Roe.

1814.
ANONYMOUS.

ration had been made on the premises (in *Cornwall*) on the servant of the tenant in possession, who afterwards acknowledged that he had received it. However, the affidavit did not state when this acknowledgment was made; and

THE COURT said, that for this omission it was insufficient; but as the premises were in *Cornwall*, he might have a rule to shew cause.

Rule *Nisi*.

1817.

ANONYMOUS.

6th Feb.

The plaintiff, in an ejectment on a vacant possession, should proceed more regularly than in a contested possession; and if, in such a case, having obtained judgment, he should neglect to take away the rule before the expiration of two days after the Term in which the rule was obtained, the Court will not in the next Term assist him (a).

THIS was an action of ejectment on a vacant possession; the parties had proceeded regularly through all the formalities, and obtained judgment against the casual ejector in last *Michaelmas* Term; but having neglected to take away the rule for judgment within the two days after the end of the Term, *West* moved for a judgment against the casual ejector, stating that though the practice was at the rule office to punish a party for not taking away the rule within the limited time, by obliging him to take a rule *nisi* in the next Term, yet that this practice could not be pursued here, as the possession was vacant, and there was no one who could be served with the rule *nisi*.

ABBOTT J. A party who proceeds on a vacant possession should perform every thing he does in such a case more regularly than in a contested possession.

(a) Unless the rule for judgment against the casual ejector be drawn up and taken away from the office of the clerk of the rules or secondaries within two days after the end of the Term in which the ejectment shall be moved, no rule shall be drawn up or entered on the book, nor shall any proceedings be had in such ejectment. R. M. 31 Geo. 3. K. B. See *Tidd*, 7th ed. 507, and cases there quoted.

You might have prevented the difficulty ; it is your own fault, and one which in such a case we cannot help you. 1817.
ANONYMOUS.

Rule refused.

DOE ex dem. STOTT against ROE.

1815.

Hilary Term.

IN this Term counsel moved to enter up judgment against the casual ejector. The ejectment was for lands in *Lancashire*. The declaration was served in the long vacation, to appear generally of *Michaelmas* Term. No rule had been drawn up for judgment, it being a county cause, and on applying for it at the office it was refused.

In county causes, though declaration served before *Michaelmas* Term, the Court will permit plaintiff in *Hilary* Term to have judgment against casual ejector (a).

BAYLEY J gave leave.

(a) In a similar case on 26th May, 1815, *Dampier J.* granted only rule nisi ; but see the next case.

ANONYMOUS.

1818.

6th June.

MEREWETHER moved for a rule to shew cause why judgment should not be signed against the casual ejector, where the notice to appear was in last *Easter* Term. There was an affidavit of inadvertency. But

Though notice to appear was in *Easter* Term, a rule absolute in first instance for judgment against casual ejector, may be moved in *Trinity* Term.

ABBOTT J. On referring to the clerk of the rules, said the rule might be absolute in the first instance.

Holt mentioned to *Merewether* a case of the same kind, in which he had obtained a rule for judgment in the first instance.

1814.

ANONYMOUS.

18th June.

It is too late to move for judgment against the casual ejector in *Trinity Term*, when the notice to appear was in the preceding *Michaelmas Term*.

GASELEE moved for a rule *nisi* for judgment against the casual ejector, the notice being to appear in *Michaelmas Term*.

DAMPIER J. It is too late to move it now, after more than two Terms have elapsed.

Rule refused.

ERROR.

PRIDHAM *against* BUDGETT.

1816.

8th Nov.

MOORE, A. moved for leave to enter up judgment, notwithstanding the allowance of a writ of error; for there were circumstances which, he said, shewed that it was only brought for delay; viz. The plaintiff in error said, that "if the executor of the defendant in error would not take the security offered him, he would plague him as much as possible."

LORD ELLENBOROUGH C. J. We have had these sort of cases again and again, and we confine them to an express declaration.

Moore cited the case of *Spooner and others v. Garland, 2 Maule & Selw. 474.*

LORD ELLENBOROUGH C. J. The term "plague," used here, might be by any means; in the case you cite the delay was stated to be by writ of error.

Rule refused.

ANONYMOUS.

1813.

30th Jan.

ESPINASSE moved for a rule to shew cause why a writ of error should not be set aside, on an affidavit that the defendant had declared that he would delay the cause as much as possible, and bring a writ of error.

Andrews, contra, said that the declarations were

The Court will not allow a party to enter up judgment, notwithstanding a writ of error, unless it is expressly shewn that it was brought for delay. Therefore a declaration by the plaintiff in error, that he would plague the plaintiff in the original action as much as possible, is not sufficient, because it may be by other means than by writ of error.

If a party declares that he will delay a cause, and states the means through which he will delay it, viz. by writ of error, the Court will compel him to shew good causes of error.

1813.

ANONYMUS.

made early in the cause, and at the time the defendant was arrested, and that sufficient causes of error might have arisen since; and in support of this he cited 2 *Tidd*. 556. 6th ed. 549. and cases there cited.

BAYLEY J. Is there any case to this extent? In other cases somewhat similar to this, the rule for setting aside the writ of error was refused, on the ground that the party had not stated the means by which he would delay the cause; but in this it was otherwise, for the defendant stated the means; viz. by writ of error. I think these declarations are sufficient to call on the defendant to shew that there is good cause of error.

Rule absolute.

1817.

12th Feb.

GOODWIN against SUGAR.

Sunday is not one of the four days in the rule to appear to the writ of *sci. fa. quare executionem non*, although it be not the last.

PARKE shewed cause against a rule of *Spankie*, for setting aside a judgment for not assigning errors, on the ground that the rule to appear to the *sci. fa. quare executionem non* had only been four days, including *Sunday* as one of the intermediate days. Parke urged, that in other cases, rules for judgment, &c., *Sunday*, if it was not the last day, was considered as one of the days for the rule to run.

ABBOTT. J. on referring to the master, said that he understood that *Sunday* was not reckoned, and that consequently the judgment was irregular.

Rule absolute.

BREACH against DICKSON and others.

1814.

14th April.

SELWYN moved for a rule to shew cause why a *sci. fa. quare executionem non* should not be set aside, on the ground that it was tested before the return of the writ of error.

A *sci. fa. quare executionem non* may be tested before the return of the writ of error (a).

THE COURT seemed inclined at first to grant the motion, but afterwards asked *Selwyn* if he had any authority to shew in support of his motion; and he answering in the negative, they said* they were distinct proceedings, and ultimately refused the application.

Rule refused.

(a) *Tidd*, 7th ed. 1211.

BYGROVE against BOLLAND.

1814.

21st Nov.

MARRYAT, on a former day, had obtained a rule to shew cause why proceedings should not be stayed, pending a writ of error.

Admission by an attorney's clerk that writ of error has been brought for delay, is not sufficient to prevent the writ from operating as a supersedeas (b).

Lawes shewed cause, on the ground that the writ of error was brought for delay; and produced an affidavit, stating that the attorney's clerk who taxed the costs, upon serving the rule for allowance of the writ of error, admitted that it was for delay.

SED PER CURIAM. The admission that a writ of error is for delay must come from either the party in the cause or the attorney, and not from a clerk who may know nothing of the matter. Suppose at the time of suing out a writ the attorney's clerk was to say it was issued to harrass the defendant, would that be evidence of malice in the plaintiff? The admission must be by some person properly authorized.

Rule absolute.

(b) *Tidd*, 550. 2 *Smith*, 60

EVIDENCE AND WITNESSES.

1816.

ANONYMOUS.

26th Jan.

The date of a letter is evidence against the writer that the letter was written where dated.

THE Attorney-General, on a question as to Sir *William Fletcher's* bankruptcy, produced a letter written by him, which said he would range the world at large; and it was contended that this was an act of bankruptcy. A doubt arose whether the letter came from *Paris*, though dated there.

LORD ELLENBOROUGH C. J. If I find the letter at the top of it purporting to come from *Paris*, I must believe it to have been so as against the writer.

Rule refused.

1816.

BELL *against* THOMPSON.18th June.

Though a witness proves a fact to the surprise of the other party, and though by mistake he was not cross-examined, nor was any evidence given to contradict him, or any observation made on his evidence, the Court will not grant a new trial.

THE Attorney-General moved to set aside a verdict given for the plaintiff, and to be let into a new trial on terms. He stated that a witness on the part of the plaintiff had proved a fact to the great surprise of the defendant, and that he (the Attorney-General) had omitted to cross-examine him, or observe on his evidence; and on this he grounded his present motion.

LORD ELLENBOROUGH C. J. We cannot on that ground grant a new trial. The witness was not impeached at all, and no evidence was called to contradict him, nor were there any questions asked of him.

Rule refused.

DOE *ex dem.* CLARKE against TRAPAUD.

1818.

18th June.

THE Attorney-General moved for a new trial, on the ground that a witness was called on his *subpœna* and did not appear at the moment, but came just before the verdict was given in.

Rule Nisi.

Rule nisi for new trial granted where a witness was absent, and called upon a subpœna, but did not come till just as the verdict was taken.

NEWMAN against BENNETT.

1819.

11th Nov.

THIS was an action for an assault, in which the defendant, as music-master of the *Chichester* cathedral, pleaded a justification of the trespasses, as committed by him in correcting the plaintiff, who was a chorister of the cathedral, and had absented himself from his duty. The cause was tried before *Lens*, Serj. at the assizes at *Sussex*, when a verdict was found for the plaintiff for the sum of 5*l.*, it being held that the justification was not sustainable. It appeared that the plaintiff had applied for leave to go and sing at a catch club, but permission was refused. Notwithstanding this refusal the plaintiff went to the club, and on the next day the defendant, as music-master of the cathedral, and consequently having jurisdiction over the choristers, corrected the plaintiff, and committed the assault complained of.

A music master of cathedral is not justified in even moderately beating a chorister for singing at a catch club, though that might be injurious to his performing in the cathedral. Evidence of the practice of other cathedrals not admissible.

Gurney now moved to set aside the verdict, and have a new trial, on the ground of a misdirection. Evidence was offered at the trial of the practice at other cathedrals, but was rejected. Evidence was also proposed to be brought forward, in order to shew that the chorister's practising at catch-clubs disqualified him for singing in the cathedral. The judge at the trial thought the evidence too general, and rejected it.

1819.

NEWMAN
against
BENNETT.

BAYLEY J. observed that the boy was under an obligation to attend in the church at certain periods in order to receive instruction, but that the master had no occasion for his services at the time when his absence was complained of. And

ABBOTT C. J. said, that supposing the boy had bathed and caught cold, that would be injurious to his singing, but would not justify the measures adopted by the defendant.

PER CURIAM.

Rule refused.

1818.

11th April.

DOE *ex dem.* JOHNSON against JOHNSON.

If upon a fair and diligent enquiry an attesting witness to a deed cannot be found, evidence of his handwriting is admissible. In accounting for the absence of an attesting witness, or loss of a written instrument, general answers to enquiries that nothing is known concerning them, are admissible in evidence; but not declarations as to particular facts, if the party making them is capable of being called (a).

THIS was an action of ejectment, which was tried during last Term; and the case stated on the part of the lessor of the plaintiff was, that the third part of certain premises had been devised to him by his father; and on the part of the defendant it was stated, that the defendant's uncle had been the owner of, and had settled the premises on the plaintiff's father for life, with remainder to *William Johnson*, one of the defendants. Upon the trial a question arose whether there was sufficient evidence to account for the absence of an attesting witness of a deed. One of the attesting witnesses proved the deed, and evidence was attempted to be given of the hand-writing of the other, on the ground, as it appeared, that he had gone to sea about twenty years ago and upwards, and had not since been heard of, except till some time back, when he called on his brother; but upon enquiries being made, his brother said he knew nothing of it. GARROW B. thought the evidence adduced was not

sufficient to render secondary evidence admissible, and a verdict was given for the plaintiff, with leave to move to set it aside; and *Phillips* accordingly now moved, contending that the absence of the witness had been sufficiently accounted for, so as to render the secondary evidence admissible.

1818.

DOE *ex dem.*
JOHNSON
against
JOHNSON.

BAYLEY J. The brother was not called, as he should have been, to have given evidence concerning the absent witness, neither was there any evidence from any of the neighbours that he was never heard of since.

LORD ELLENBOROUGH C. J. Did it appear in what capacity he went to sea, whether as a sailor, or how? I think if you had availed yourself of what the brother alone said, you certainly did wrong; but there was sufficient evidence without that to raise the presumption that he was not easily to be found.

Phillips referred to *Crosby v. Percy*, 1 Taunt. Rep. 364. where evidence of the answers made to the enquiries after an attesting witness to a deed was held admissible, although the person who gave the answers was alive, and was not called in person to give in his evidence. He also referred to *Cunliffe v. Sefton*, 2 East, 183.

LORD ELLENBOROUGH C. J. The answer in that case was, that the party had absconded to avoid his creditors; besides which, other circumstances induced the Court to admit secondary evidence; here the evidence of what the brother said clearly could not have been received; since it was a fact; but the evidence that enquiries were frequently made, and the parties knew nothing of the man, might certainly have been admitted.

1818.

DOE ex dem.
JOHNSON
against
JOHNSON.

Phillips said, that in cases of written instruments, evidence is always given of answers to enquiries as to the existence of papers, and of search made after them.

PER CURIAM. The evidence of what the brother said cannot certainly be admitted, whilst the brother himself could have been called. The only evidence admissible is the general evidence that unsuccessful enquiries were made, but not the particular facts; and therefore the evidence of what the brother said cannot be received, although it is sufficient to shew that enquiries had been made, and on that ground,

Rule *Nisi*.

1816.

26th Jan.

MOORE against ADAM.

In an action for an assault, though the defendant has not pleaded a justification, he may extract evidence in mitigation of damages, on the cross-examination of the plaintiff's witnesses. The plaintiff cannot give remote consequences in evidence as special damages.

THE plaintiff moved at great length for a new trial. The verdict had been given for the plaintiff for 500*l.* in an action for an assault, at *Alicant*, in *Spain*. He moved on the ground, that evidence of justification was admitted which should not have been received, and also that he was prevented from giving evidence of his special damage, which was, that in consequence of the assault he had been driven from *Alicant*, where he had before carried on trade as a merchant. The defendant at the trial called no witnesses, but all the evidence for him was extracted on the cross examination of the plaintiff's witnesses.

LE BLANC J. There is no doubt but that on the general issue in an action for an assault, the defendant cannot give evidence of a justification. *But he may, on the cross examination of the plaintiff's witnesses, extract evidence in mitigation. And all was properly left for the jury.

BAYLEY J. There is no doubt but that the defendant was entitled to the benefit of this evidence obtained on the cross examination of the plaintiff's witnesses, and it was all fairly left to the jury. The rule as to special damage is, that you may give in evidence any special damage which is the clear and immediate result of the act which is complained of; but you cannot give in evidence as special damage any remote consequences: here the special damage is that the plaintiff was obliged to leave his trade in *Alicant*, because he had received two or three blows there; this is by far too remote. Therefore there is neither improper evidence admitted, nor improper evidence rejected.

1816.

MOORE
against
ADAM.

Rule refused.

ANONYMOUS.

1813.

24th May.

ABBOTT moved for a rule to shew cause why the lessor of the plaintiff in ejectment should not be permitted to examine a material witness in the cause upon interrogatories, on the ground of an affidavit of a physician, stating that it would endanger his life to attend the trial.

The Court refused to grant a rule to examine a material witness upon interrogatories, on the trial of an action of ejectment, on the ground that he was so ill that he could not attend (a).

PER CURIAM. We cannot grant it. You must apply to a court of equity, or get them to admit the facts.

(a) See 4 *Taunt.* 46. The Court will not grant such a motion, unless with the consent of both parties.

ANONYMOUS.

1816.

10th Feb.

GURNEY on a former day had obtained a rule, calling on the defendant to shew cause why in read on a trial of an indictment for perjury, provided the defendant consents to it. The Court will permit interrogatories to be

1816.

ANONYMOUS.

terrogatories should not be read on a trial against him for perjury ; and he now moved to make the rule absolute, and called upon the Attorney-General to consent, on behalf of the defendant, that they might be read.

The Attorney-General said that he doubted whether he had power to do so ; and that if he had, he was likewise in doubt whether the Court in such case would permit them to be read ; but

THE COURT said, that undoubtedly it might be done, provided the defendant consented to it ; and

The Attorney-General consenting for the defendant, the rule was made

Absolute.

1815.

1st May.

ADAMSON *against* NOEL.

The Court will not direct the Master to review his taxation, because he has allowed for witnesses which were not called.

CLARKE moved for the Master to review his taxation, on the ground that the witness had not been called by the plaintiff, for whom an allowance was made, when in fact the plaintiff was informed; just before the trial, that this witness would give evidence directly against him.

PER CURIAM. If we granted a rule to review in this case there would be no end to such applications, and an issue would, in all cases, be to be tried before the Master, whether a witness was material or not.

Rule refused.

1814.

25th June.

ANONYMOUS.

The Court will not allow the expenses of plaintiff's witnesses, brought too early to the assizes to attend on a trial there.

RAINE moved for a rule to shew cause why the Master should not review his taxation of costs,

on the ground that he had not allowed for divers expences of the witnesses. The trial of the cause took place at York, and nine witnesses were brought up on the first day of the assizes, although the cause was entered very late in the list to be tried, and the witnesses were kept there eleven days.

1814.

ANONYMOUS.

LE BLANC J. BAYLEY J. and DAMPIER J. said, that the witnesses need not have been brought up so soon, and that they were the plaintiff's witnesses, who knew when the cause would come on; but afterwards, on account of the large sum paid them, they granted a Rule Nisi.

ASHTON and Wife against HAIGH.

1814.

10th June.

SCARLETT, on a former day, had obtained a rule to shew cause why an attachment should not issue against a witness *Haigh*, for not appearing to give evidence, in pursuance of a subpoena, to attend a trial at *Lancaster*.

The whole expences must be paid, or tendered, to a witness, living at a distance, in order to ground an attachment against him for not obeying a subpoena (a).

Garrox, Attorney-General, shewed cause, and said that the question was, whether sufficient money had been tendered the defendant to pay his expences of attendance; for he contended, that unless his reasonable expences were paid or tendered him, not only for going, but also for returning from the trial, the defendant was not obliged to attend; and for this he cited *Fuller v. Prentice*, 1 Hen. Bla. 49.

Scarlett, in support of his rule, contended that it

(a) See 2 *Stra.* 1150. 13 *East*, 16 (a), More fully stated, 1 *Bla. Rep.* 36, 1 *H. Bla.* 49. 2 *Tidd*, 6th ed. 848. This doctrine is only where the witness lives at a distance; for if the witness lives within the weekly bills of mortality, it is usual to give a shilling with the subpoena ticket. 2 *Tidd*, 6th ed. 848.

1814.

**ASHTON and
Wife against
HAIGH.**

was only necessary to tender a small sum, and to leave the remainder uncertain, and pay it afterwards.

LE BLANC J. The practice is otherwise ; if the sum is left uncertain, it is at the peril of not being able to attach the witnesses.

Rule discharged, but without costs, on condition that the plaintiff should not demand back the surplus of the money paid (b) to the defendant's witness.

(b) The money paid witness was 15*l*.

EXECUTION.

WILSON *against* KINGSTON.

1816.

14th Nov.

CHITTY moved for a rule to shew cause why a *capias ad satisfaciendum*, and the proceedings thereon, should not be set aside, on the ground of irregularity. A *fi. fa.* for a debt had been issued, and the return thereto stated a levy of a part, and that goods and a lease of the value of — *l.* less than the amount of the sum indorsed to be levied, remained now in the hands of the sheriff unsold. The plaintiff sued out a *ca. sa.* for the residue, and the sheriff's return thereto recited the former *fi. fa.* and return, and stated that the goods and lease had been sold for — *l.*, being less than the debt; but it did not state any return by the sheriff, what had been done with the goods and lease. Under these circumstances *Chitty* objected that it was no return by the sheriff, being only a suggestion of the plaintiff's attorney that the lease was afterwards sold, and he relied on the judgment given by GIBBS C. J. in 2 *Marsh.* 78. *Com. Dig.* tit. Execution, H. *Barnes*, 213.

Where a *fi. fa.* has been issued, and goods taken under it have been sold for a part of the debt, a *ca. sa.* for the remainder cannot be issued until the sheriff has finally returned the *fi. fa.* (a).

PER CURIAM.

Rule *Nisi*.

THE COURT afterwards pronounced the rule absolute, observing that the recital was not sufficient, it not being matter returned by the sheriff; and until he had finally returned what had been done with the property, no *ca. sa.* for the supposed residue could legally be issued.

(a) Where only part of the money has been levied on a writ, the first writ must be returned before a second execution can be issued. *Barnes*, 213. For that must be grounded on the first writ, and recite the proceedings thereon. 1 *Tidd*, 6th ed. 1066.

1817.

ANONYMOUS.

23rd Nov.

Rule enlarged for time for sheriff to return writ, though there was only affidavit that a commission of bankruptcy had issued, and that the sheriff was fearful that act of bankruptcy was before levy.

MEREWETHER shewed cause against a rule obtained by *West*, for time for sheriff to return the writ. The affidavit only stated that a commission of bankruptcy had issued, and that notice was in the newspaper. [BAYLEY J. How soon after levy?] *Mercwether*. The levy was on the 30th *October*. The commission was issued on 4th *November*.

ABBOTT J. Were no assignees appointed?

Mercwether. None. The affidavit only states that deponents were fearful that the act of bankruptcy preceded.

PER CURIAM. Let the rule be enlarged till next Term.

GUARANTEE.

DIXON *against* BROOMFIELD.

1814.

11th Nov.

PARKE moved to set aside a nonsuit. The action was brought on a guarantee, in a note addressed to, and left at the plaintiff's, which stated that "Mr. Bromfield called to say that he will be responsible for goods delivered to Mr. H." This was written by the clerk of the plaintiff in the presence of the defendant. [LORD ELLENBOROUGH C. J. Was there any evidence that the defendant assented to it?] Parke. Yes. [BAYLEY J. Had he signed it?] Parke. No. [LORD ELLENBOROUGH C. J. said, that if this was evidence, no one could safely go into a shop, for any person there might write down a guarantee, upon which he might be made liable to a large amount.]

Rule refused.

BOVILL *against* TURNER.

1815.

13th Nov.

BOLLAND moved to set aside a nonsuit. It was an action for the price of coals, the payment of which the defendant had guaranteed in these words: "You may let Lany have coals to 50*l.*, for which I will be answerable at any time." Coals were supplied for many years, and many were, from time to time, delivered and paid for; but ultimately more than the sum of 50*l.* was in arrear.

A guarantee for payment for coals to 50*l.* for which defendant would be answerable at any time, is not a continuing guarantee (a).

(a) See 12 *East*, 227. 2 *Campb.* 413. 436.

1815.

BOVILL
against
TURNER.

BAYLEY J. You say it is a running guarantee for 50*l.* at all times.

Bollund. *Lany* was a dealer; he could never be supposed to be confined to 50*l.* only. There was notice afterwards that the defendant would not be liable further.

ABBOTT C. J. There was evidence that the words "at any time" were introduced afterwards, because the plaintiff thought they were omitted.

BAYLEY J. He was only a guarantee for 50*l.*

Rule refused.

HABEAS CORPUS.

THE KING *against* JOHN CAM HOBHOUSE, Esq.

1820.

5th Feb.

ON a former day, *J. Evans* obtained a writ of *habeas corpus* to bring up the body of this gentleman from his Majesty's gaol of *Newgate*, in order to be discharged out of the custody to which he had been committed, by virtue of a warrant under the hand of the Right Honourable *Charles Manners Sutton*, Speaker of the House of Commons, for a contempt of that house. When the *habeas corpus* was first applied for, no ground of objection to the commitment having been stated, the Court were disinclined to grant the writ; but the case of the *King v. Flower (a)* was referred to for a *dictum* of LORD KENYON C. J. shewing that the Court would grant the *habeas corpus* in the first instance, without any specific grounds being stated. The Court, on the authority of that case, and considering that the question was one in which the liberty of the subject was involved, directed the writ to issue; and now,

The Gaoler of *Newgate* brought up the prisoner, together with his return to the *habeas corpus*. The return stated, that on the 13th of *December* 1819, *John Cam Hobhouse*, Esq. was committed to the custody of the said Gaoler, by virtue of a certain warrant to the tenor and effect following:—

“ *Die Luna*, 13th *December*, 1819.

“ Whereas the House of Commons have this day resolved that a pamphlet to (*Thomas Lord Erskine*) is

The House of Commons having voted the defendant guilty of a breach of their privileges, for publishing a libel upon the house, and having ordered him to be committed to *Newgate* during their pleasure, and the Speaker's warrant being returned into this Court upon a *habeas corpus*, sued out by the defendant, the Court refused to discharge him out of custody.

The writ of *habeas corpus*, whether at common law or under the 31 C. 2. s. 2. does not issue as a matter of course in the first instance, upon application, but must be grounded upon affidavit, upon which the Court are to exercise their discretion whether the writ shall or shall not issue.

1820.

REX
against
HOBHOUSE.

a scandalous libel, and calculated to inflame the minds of the people to acts of violence against the legislature, and more particularly against this House, and that it is a high contempt of the privileges and constitution of this House; and whereas *John Cam Hobhouse* having acknowledged himself to be the author of the said libel, this House hath adjudged him to be guilty of a high contempt of the privileges and constitutions of Parliament; and whereas the said House hath this day ordered the said *John Cam Hobhouse* to be committed to *Newgate*; these ~~are~~ therefore to require you to accept into your custody the body of the said *John Cam Hobhouse*, and him safely to keep, during the pleasure of the said House, for which this shall be your sufficient authority.

“ Given under my hand this 13th day of
December, 1819.

“ *Charles Manners Sutton; Speaker.*”

The return having been read by one of the officers of the Crown side of the Court,

Mr. Hobhouse prayed the Court to appoint another day to hear his grounds of objection to the warrant above mentioned, and his commitment under it; complaining that the lateness of the hour, and his own infirmity of health, would not permit him to argue the case in the manner he wished.

THE COURT said, that before they could grant the indulgence prayed for they must be informed of the nature of the objections intended to be submitted to the return to the *habeas corpus*.

Mr. Hobhouse then stated, that he intended to urge the following objections to the return:—*First*, that the *House of Commons* is not a Court of Judicature

competent to decide on the alleged offence suggested in the warrant. *Second.* That there is no adjudication on the face of the return; and therefore, unless the *House of Commons* can adjudge, they cannot issue such warrant, because they are not a Court of Judicature. *Third.* Supposing the *House of Commons* to be a Court of Judicature, it has taken under its cognizance that which cannot be considered as a contempt, but as an offence at common law, and consequently punishable by the laws of this country; for, the warrant describes the pamphlet to be a seditious libel, tending to inflame the people to acts of violence against the legislature. *Fourth.* On the face of the return, it does not appear that the party accused has ever had any opportunity of making his defence, which is not only against every principle of English law, but is even contrary to the proceedings of the *House of Commons* itself. *Fifth.* Assuming the *House of Commons* to be a Court of Judicature, and having competent authority to take a seditious libel under its cognizance, it cannot condemn an Englishman to imprisonment. *Sixth.* That this Court has power by virtue of the *habeas corpus* act, to liberate a person committed by the *House of Commons*. And, *Seventh.* That supposing all these grounds of objection were not available, still there is a fatal objection to the form of the warrant of commitment, which renders it impossible to detain any longer in prison a person committed under it; namely, that there is no publication stated on the face of the warrant;—the pamphlet in question is not called a printed pamphlet, nor is the person accused said to have authorized the printing or publishing the alleged libel.

1820.

 REX
 against
 HOUSE.

THE COURT, after considering the case for some time, proceeded to deliver their judgment to the following effect:—Having conferred together upon this

1820.

 REX
 against
 HUBHOUSE.

case, we are clearly of opinion, that, sitting in this Court, we are not authorized to enter into the discussion of any of the objections taken by the gentleman on the floor to this commitment. It has been settled by many precedents, brought from time to time, before the different Courts of *Westminster Hall*, and finally in the case of *Sir Francis Burdett v. Abbott (a)*, (which went by writ of error to the *Exchequer Chamber* from this Court, and ultimately to the *House of Lords*), that it is competent for the *House of Commons* to commit for a contempt of their privileges, and that they are the judges, and the only judges, of what is a contempt of their privileges. There are a great many cases in which this Court, and other Courts of *Westminster Hall*, have from time to time refused to discharge a person so committed, on the ground that the Court has no authority to entertain such an application. The cases of *Lord Shaftesbury (b)* and *R. v. Patty (c)*, are decisive authorities, to shew that the Courts of *Westminster Hall* cannot judge of any law, custom, or usage of Parliament, and consequently they cannot discharge a person committed for a contempt of Parliament. The power of commitment for contempt is incident to every Court of Justice, and more especially it belongs to the High Court of Parliament; and therefore it is incompetent for this Court either to question the privileges of the *House of Commons*, or a commitment for an offence which they have adjudged to be a contempt of those privileges. Here the *House of Commons* have adjudged, (as appears by the warrant) that the gentleman on the floor has been guilty of a contempt, in having published a seditious libel, of which he has acknowledged himself to be the author. We cannot enquire into the form of the commitment, even supposing it is open to objection on the ground

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(a) 14 *East. Rep.* 1. (b) 1 *Mod.* 144.(c) *Lord Raym.* 1195.

of informality. Dismissing therefore the general question as to the power of this Court to discharge a person committed by the *House of Commons* for a contempt of its privileges, it is necessary to advert to the circumstances under which the Court granted a *habeas corpus* in this case, in order to correct an erroneous opinion which seems to have obtained; namely, that the Court is bound in the first instance to issue the *habeas corpus* at all events, without exercising its discretion as to the grounds upon which the writ is moved. At the time when this application was made for a *habeas corpus*, the 31 Car. 2. c. 2., could not have been accurately considered, or perhaps brought to the attention of the Court; for if it had, the Court probably would not have granted the writ. The *habeas corpus* act clearly does not apply to a case of this description, because it is confined wholly to the cases of commitment for *crime*, with the exception of treason and felony, or the suspicion thereof. At the same time, under the common law jurisdiction, the Court has power to grant a *habeas corpus*; but whether it be granted under the common law jurisdiction, or under the statute, there ought always to be a proper ground laid before the Court, to justify it in granting a writ. It is not to be granted as a matter of course, and at all events, but the party seeking to be brought up by *habeas corpus* must lay such a case on affidavit before the Court as will be sufficient to regulate the discretion of the Court in that respect. The Court will not in the first instance grant a *habeas corpus*, when they see that in the result they must inevitably remand the party. The Court, in this instance, ordered the writ to issue, upon a suggestion that the Court was bound at all events to grant it; and certainly a most respectable authority was cited for that proposition; and the Court being anxious, in a case where the liberty of the subject might be supposed to be affect-

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 REX
 against
 HOBHOUSE.

1820.

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against
HOBHOUSE.

ed, thought it right to grant the writ, in order that the question might be finally settled. That decision, however, which could not but have been anticipated, the Court is now bound to pronounce, namely, that the *habeas corpus* does not lie in the first instance, but must be left to the discretion of the Court, when guided by grounds stated on affidavit. There are not wanting authorities for this decision. In the case of the *King v. Schreier* (a), and in the case of the *Three Spanish Sailors* (b), the Court, acting upon this principle, said, that they would not grant the writ in a case where they saw that they must remand the party as soon as he was brought up. The Court is bound to exercise their discretion as to the grounds laid before them for granting the writ, and they are not to order it as a matter of course in the first instance. It is necessary thus to remove an error which seems to have prevailed upon this subject, in order that this case may not hereafter be cited as a precedent. We are of opinion, upon the grounds already stated, that the prisoner must be remanded.

The prisoner was accordingly remanded to his former custody.

(a) 2 Burr. 767.

(b) 2 Sir W. Bl. 1324.

HAWKERS AND PEDLARS.

MOORE q. t. *against* EDWARDS.Tuesday,
16th Nov.

CLARKE moved to set aside a verdict obtained for the plaintiff in an action for penalties on the Hawkers and Pedlars' Act. The defendant bought books in sheets, and made them up, and carried them from *London* into the country, and sold them at places where he did not reside; and it was contended that he was a maker of the goods within the exception in the Hawkers and Pedlars' Act.

A person buying books in sheets and making them up, and then going from *London* into the country and selling them, is within the Hawkers and Pedlars' act, and is not exempted from penalties as the maker of the goods (a).

ABBOTT C. J. This case comes within the act of parliament. A person going from *London* into the country is within the term travelling, and the defendant is not within the exception as a maker of the commodity.

BAYLEY J. and HOLROYD J. were of the same opinion.

PER CURIAM.

Rule refused.

(a) The 50 Geo. 3. c. 41. s. 5. (the Hawkers and Pedlars' Act) imposes the duty upon every hawker, pedlar, petty chapman, and every other trading person, going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise, in *England, Wales, or Berwick*, carrying to sell, or exposing to sale, any goods, wares, or merchandize. And the 23d section provides, that the act shall not extend to prohibit any person from selling any printed papers, licensed by authority, or any fish, fruit, or victuals, nor to hinder the real workers or makers of any goods, wares, or manufactures of *Great Britain*, or their children, apprentices, or known agents or servants usually residing with such real workers or makers only, from carrying abroad or exposing to sale and selling by retail or otherwise, any of the said goods, wares, or manufactures of his or their own making, in any mart, market, or fair, and in every city, borough, town corporate, and market town; nor any tinkers, coopers, glaziers, plumbers, harness menders, or other persons usually trading in mending kettles, tubs, household goods, or harness whatsoever, from going about and carrying with them proper materials for mending the same. See 2 Chitty's Commercial Law, 163.

HIGHWAY.

1816.

24th Jan.

REX against LINCOMBE and WIDCOMBE.

An indictment against a parish for not repairing, will not be quashed on an affidavit that the way is now in repair, but defendant must plead guilty, and pay a nominal fine.

BAYLEY, R. moved to quash an indictment, on affidavits that the road was in repair.

BAYLEY J. That cannot be done, for you thereby destroy the evidence which the indictment, and a conviction thereon would afford, against the parish, in future, as to its liability; and as you admit by your application the liability to repair, and that the road was out of repair, you should take a rule *nisi*, why the defendants should not be discharged, on pleading guilty and paying a small fine.

Rule *Nisi* accordingly.

IMPARLANCE.

1815.

5th June.

CROOK against PEAT.

The Court will not grant a special imparlance, except to prevent injustice.

CAMPBELL moved for leave to enter a special imparlance, in order that he might be able to plead in abatement in this action, which was brought against one of two executors; he was too late to plead with a general imparlance: he read from the Master's book a rule of 5 Anne, to authorize this motion.

But DAMPIER J., admitting the motion might be made, said it was an application to the discretion of the Court, which would not interfere but to prevent injustice, which did not seem to exist in this case.

Rule refused.

INDICTMENT.

REX *against* INHABITANTS *of* COUNTY *of* SOUTH-
AMPTON.

1818.
13th April.

GASELEE moved to set aside a verdict for the Crown (on the trial before HOLROYD J. in *Wills.*) of an indictment against the county of *Southampton*, for not repairing a bridge. There was a plea that the Marquis of *Buckingham* was liable. The motion was either for a new trial, or judgment to be staid till event of the trial with the Marquis of *Buckingham*. The Duke of *Chandos*, from whom the Marquis of *Buckingham* claims, some years ago pulled down the parapet of the bridge, and put up a *Chinese* parapet, but took away the bricks and built another bridge with them. The question is, whether that was done under any obligation to repair, or as an ornament. *G. B.* has been on stone. It is an old bridge. The bridges bore the name of *Chandos*. There was no evidence of any thing further done to the bridge, but painting the wood work.

The Court is reluctant to stay judgment on an indictment for not repairing a bridge. They will not stay it generally, but only till further order; and if trial of another indictment not proceeded in with all despatch, judgment will be given (a).

BAYLEY J. Carrying away the bricks is only taking away the old materials for the new.

Gaselee. There was no injury by delay whilst the bridge was repairing.

LORD ELLENBOROUGH C. J. If there was any

(a) The *King* v. the Inhabitants of *Wandsworth*. 1 Bar. & Ald. 63.

1818.

REX
 against
 INHABITANTS
 of County of
 SOUTHAMP-
 TON.

doubt, and any substantial question to be tried, we should be ready to stay the judgment; but since the first case of that kind, *Rex v. Inhabitants of Oxfordshire*, applications of this kind have increased so much, that we do not like further to increase the number.

Gaselee. There are affidavits that new evidence has been obtained since the trial. There is no proof that the county had ever done any thing.

LORD ELLENBOROUGH C. J. This motion is to have the effect of a new trial indirectly, and to give advantage of sifting the present prosecutor's evidence, in order to contradict it on a future occasion.

Gaselee. This case is of great importance, as charging the county for ever.

LORD ELLENBOROUGH C. J. As binding for ever on the county, we will suspend it; but not generally, only till we shall make further order; and we expect that in the mean time all reasonable speed be used to try the question with the Marquis of *Buckingham*, and that it be brought to a conclusion with as much haste as the case will admit of. And in case it is not so, we shall direct judgment to be entered up upon the present verdict.

Rule *Nisi* for staying judgment on these terms.

THE KING *against* THE REV. JOSHUA KING and
another.

1820.

1st Feb.

THIS was an indictment found against the defendants at the last *Knuttsford* quarter sessions for the county of *Chester*, for an alleged conspiracy to poison, by means of arsenic, the cattle of Sir *Thomas Stanley*, Bart.; the indictment having been removed into this Court by *certiorari*.

It is no reason for changing the venue in an indictment for a conspiracy to destroy foxes and other vermin, that the gentry of the county in which the indictment was found are addicted to fox-hunting

Starkie now moved to change the venue from *Cheshire* to *Lancashire*, upon an affidavit, suggesting that the ground of the supposed conspiracy imputed to the defendants, was the circumstance of the defendant Mr. *King* having placed in his lands the noxious drug in question, for the purpose of destroying foxes and other vermin, which had injured his property; that the noblemen and gentlemen of *Cheshire*, who were likely to serve upon the jury summoned to try the indictment, were much addicted to fox-hunting; and that several injurious statements having appeared in the public newspapers upon the subject of the charge imputed to the defendants, prejudicial to their character and motives, deponent for these reasons verily believed, that he should not have a fair and impartial trial in the county of *Chester*.

THE COURT said they could not assume that all the gentlemen of the county of *Chester*, who might be summoned to discharge their duty as jurors, would do injustice to the defendant, by reason of the pleasure they took in the amusement of fox-hunting; and as no suggestion was advanced that the prosecutor was the author of the injurious publications complained of, there was no ground for changing the venue.

Rule refused.

INQUIRY.

1820.

4th Feb.

WILLIAMS *against* REEVES.

Motion to set aside an inquisition for excessive damages, must be made on affidavits, to be produced at the time the rule is granted. Therefore where such a motion was made on the last day of Term, without affidavit, and the rule was afterwards drawn up on an affidavit sworn before a judge in vacation, the Court in this Term discharged the rule with costs.

THIS was a rule obtained on the last day of last Term, calling on the plaintiff to shew cause why the inquisition in this case should not be set aside, on the ground of excessive damages(a).

F. Pollock now shewed cause, and contended that the rule must be discharged, with costs, having been moved for without any affidavit whatever, and drawn up afterwards, as of the last day of last Term, upon an affidavit sworn several days after the Term, before a judge at chambers. It was quite irregular to draw up a rule upon an affidavit which had not existence at the time the rule was granted.

J. Evans, in support of the rule, stated that the writ of inquiry had only been executed at three o'clock in the afternoon of *Saturday*, the 27th of *November*, and on the *Monday* following the motion was made; so that every indulgence ought to be allowed for the inadvertence of omitting then to produce an affidavit, supposing it to have been necessary, which he submitted it was not; because this being a writ of inquiry issuing out of this Court, any injustice done to the defendant would entitle him to relief, without any affidavit. The action was for a common assault, and the jury gave 250*l.* damages. The defendant, in pursuance of the order made last

(a) *Vide ante*, 1 Vol. 729.

Term, had paid 100*l.* into Court, as the condition of drawing up the rule *nisi*, and therefore the Court would hardly deprive him of the benefit of the rule, upon this preliminary objection, that no affidavit was produced at the time the motion was made.

1820.

 WILLIAM
against
 REEVES.

BAYLEY J. (the only judge in Court at the time the rule came on) said, it was utterly impossible to grant such a motion as this, without an affidavit. Had the defendant's counsel stated at the time he moved, that he was not then furnished with an affidavit, probably the Court might have allowed him to apply to a judge at chambers, or have permitted him to draw up the rule, upon producing the requisite affidavit. The only indulgence that could be now allowed the defendant was, to permit him to draw up the rule as of the first day of the present Term, on the affidavit sworn in vacation.

Pollock said he would not resist this indulgence, provided the defendant was ordered to bring the whole damages into Court, as he understood that the defendant had now left the country.

BAYLEY J. said this was but reasonable, under the circumstances stated, and ordered that the whole money should be brought into Court within two days, otherwise the rule to be discharged with costs. The case was afterwards mentioned to the Court, *Evans* complaining of the hardship of these terms; when

*

THE COURT said, that he ought to have come with proper instructions in the first instance; and as he had not, no indulgence could be allowed.

Rule discharged, with costs.

1820.

4th Feb.

BURGESS against ROYLE.

It seems that a notice of executing a writ of inquiry in this Court can be continued or countermanded but once, the K. B. concurring with C. P. as to the practice; but where several notices and countermands of enquiry had been served, and at length there was a fresh, and not a continuing notice served, it was held, that the inquisition under it was regular.

MOTION to set aside the inquisition in this case, for irregularity; the alleged irregularity being, that there were two notices of executing the writ of inquiry, and two countermands. Notice of executing the writ of inquiry was given on the 1st for the 10th of *December*. On the 9th it was countermanded for the 14th, and on the latter day it was again countermanded and continued for the 15th. Fresh notice was again given on that day for the 23d, when in fact the inquiry was executed.

Abraham now, in support of the rule for setting aside the inquisition, contended, from analogy to the practice in giving notice for trial in causes where the parties have joined issue, that the notice could be continued but once, whereas here there have been two several notices, and the like number of countermands; and he referred to *Tidd*, 609. 6th ed. where it is laid down, "that notice of inquiry may be continued or countermanded, in like manner as notice of trial;" and it is there said, "that in the Common Pleas a notice of inquiry can be continued but once (a)." It is not competent for a party in the case of a trial to continue his notices, and go on successively countermanding and continuing. Therefore, from analogy to the case of notice of trial, there can be but one continuance, and one countermand. The practice in this respect did not appear to be distinctly laid down by *Tidd*, but as the rule prevailed in C. P., it was to be hoped that the practice of both Courts might be concurrent upon so material a point.

HOLROYD J., before whom alone the question was

mooted, said he would mention the case when the Court was full, which he did accordingly; and

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BURGESS
against
ROYLE.

ABBOTT C. J., referring to what was laid down in *Tidd*, 609, said there appeared to be strong analogy between the case of a notice of trial and a notice of executing a writ of inquiry; for in both cases a jury is impanelled, although in the latter the office of the jury is confined to the question of damages. It is said in the Common Pleas, that a notice of inquiry can be continued but once; but it was not said that such was the practice in this Court. Adverting, however, to the analogy between notice of trial and notice of inquiry, and the Court being anxious to conform its practice with that of the Common Pleas as nearly as they could, in an established rule, it seemed to be expedient to adopt the rule referred to in the Common Pleas. This rule, however, for setting aside the inquiry, must be made absolute without costs.

Walford, for the plaintiff. It turned out in the result, that the last notice of inquiry served was a fresh, and not a continuing notice. The Court, therefore, said that the objection fell to the ground; and they

Discharged the rule, with costs.

INSOLVENT DEBTOR.

1820.

4th Feb.

LLOYD *against* NEELE.

Discharge under the Insolvent Debtors Act, 53 G. 3. c. 102. does not bar an action of trespass where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before the discharge.

TRESPASS against the defendant for seizing, taking, and carrying away the plaintiff's goods. Plea, first, *Not Guilty*; second, That since the cause of action accrued, the defendant had been discharged by the Court for the Relief of Insolvent Debtors in *England*. General demurrer to these pleas, and joinder in demurrer.

Hutchinson, in support of the demurrer, was stopped by the Court.

Ballantine, for the defendant. This plea of discharge by the Court for Relief of Insolvent Debtors, is a bar to this action. By the 53 G. 3. c. 102. s. 1. every prisoner, in any prison in that part of the united kingdom called *England*, upon any process whatsoever, issuing from any Court whatsoever, for any debt, damage, costs, sum, or sums of money, or contempt for non-payment of money, who shall have been in actual custody for some one of the said demands during three calendar months, may apply by petition in a summary way to the Court, for discharge, according to this act. By the 10th section it is enacted, "That in case the said Court shall be of opinion that such prisoner is entitled to the benefit of this act, then the said Court shall so order and adjudge, and shall in such order specify the several creditors and persons claiming to be creditors of such prisoner, who shall appear to have been duly served with notice of such

proceedings as required by this act." The question here undoubtedly is, whether the plaintiff can be considered as a creditor within the meaning of this act. In support of the affirmative of this proposition, it may be reasonably taken, that there is some analogy between the case of a person who seeks relief under this act of parliament, and that of a person who is discharged by the operation of the bankrupt laws. This act of parliament enables persons who have been in actual custody for three months, to obtain their discharge from the demands of their several creditors, and all such persons *claiming* to be their creditors, at the time the insolvents present their petition. Suppose, in the present case, the action had been tried, and the plaintiff recovered damages for the trespass complained of before the insolvent went to prison, beyond all doubt the defendant would have been discharged from the debt. But inasmuch as the insolvent goes to prison before the action is determined, it is but reasonable, that as the cause of action arose before he sought his discharge, he should have the benefit of being relieved from the plaintiff's demand. The defendant is aware that the plaintiff has a claim upon him, and he inserts his name in his schedule, thereby admitting himself to be the plaintiff's debtor to the amount of the damages laid in the declaration. Before the insolvent goes to prison, he knows, by the declaration, what damages the plaintiff claims, and thereby he is enabled to insert in his schedule the plaintiff's demand as a debt, from which he seeks to be discharged. In the case of a bankrupt the same principle is generally acted upon. Where the damages are unliquidated, for some act done before the bankruptcy, the creditors go before the commissioners, and swear that they have sustained certain specified damages by reason of the bankrupt's conduct. But in the case of the insolvent, all he can do is to state

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in his schedule, that he is indebted to such and such persons, and that there are certain other persons who have claims upon him, and then the validity of those claims comes to be discussed. Undoubtedly, in an action of trespass, or in an action of assumpsit, where the damages are unliquidated, it would be hardly possibly for the creditor of the bankrupt to swear with precision to the amount of the debt due to him, and therefore it would be unjust to allow the certificate of the bankrupt to operate in bar of such claims. But a different state of things results from the discharge of an insolvent. He is discharged altogether from the demands of those who in any way claim to be creditors. Unless this construction is given to the act, all the persons discharged under it may be liable for claims accruing due before they petitioned the Court. Justice and good policy, therefore, require that a liberal construction should be given to this statute.

ABBOTT C. J. I am of opinion, that a man who has a right to bring an action of trespass before the insolvent goes to prison, is not a *creditor*, within the meaning of this act of parliament; and consequently, that the action is not barred by the plea pleaded.

BAYLEY J. The plaintiff does not claim to be a creditor, but he claims damages for a wrong done, which are not liquidated before the defendant goes to prison. Suppose this had been an action for an assault, could it be said, because the plaintiff laid his damages at a specific sum, that he would therefore be a creditor within the meaning of this statute? The same observation applies to this case.

PER CURIAM,

Judgment for the Plaintiff.

ANONYMOUS.

1813.

29th Nov.

THE Common Serjeant (*Knowlys*.) moved for a *habeas corpus* to bring up an insolvent debtor before the Commissioner of the Insolvent Court. The Commissioner had issued an order for the person to be brought up, signed "by the Court," and signed by the Clerk of the Court.

A commissioner of the Insolvent Court has power to have the insolvent debtors brought before him, by a rule or order of, and signed "by the Court," but not if signed by the commissioner.

LORD ELLENBOROUGH C. J. thought the application was unnecessary. The act directs the Commissioner *to cause to be brought before him*, which of course gives him power to bring the party before him by legal means; and this order appears to the Court to be sufficient. It is an order by the Court constituted by the act, and properly signed *by the Court*, and not by the Commissioner's name in his individual capacity, which would have been wrong. The words of the statute are most imperfect; which is strange, considering that the usual insolvent acts supply the words "by rule or order of the Court," which would have been most proper; but here the words are so imperfect, that it might leave it doubtful whether a parole order would not be sufficient; but the Sheriff or Gaoler ought to have some written evidence of the order, to shew as an authority for their bringing up the person, and as an answer to an escape; however, in this case, the Commissioner has most properly sent a written order of the Court, which we think sufficient, and therefore there is no necessity for a *habeas corpus*; but we cannot blame the caution of the Sheriffs or Gaolers, where the effects of their acting, if they proceeded improperly, might be so penal to them, and where there is a fair doubt.

Knowlys took nothing by his motion.

1814.

3d July.

It is no objection to a note given to an insolvent debtor, that it is not entitled in the Court.

CLARKE against DAVIS.

LAWES objected to a note given to an insolvent, that it was not entitled in the Court.

ABBOTT J. referred to the Master, who said it was usual so to entitle it, but that it was not always done; he then referred to the act, but said he could see no reason for it to be necessary. However, as it was to settle the practice, he desired it might be mentioned when the Court was full.

ABBOTT J. then referred to a MS. case in the Master's book in H. T. 1805, in which such an objection was taken by *Garrow*, and **GROSE J.** overruled it, saying he saw no reason for requiring it.

Objection overruled.

1817.

16th May.*In re JONES, an Insolvent.*

An insolvent is intitled to be discharged, though he has proceeded irregularly, if he makes an affidavit of ignorance.

HEATH opposed the discharge of an insolvent who had given notice that he should be brought up in the last *Michaelmas* Term, but of which he did not avail himself. He then went up before the Insolvent Debtors' Court, but was remanded. He then gave notice to be brought up next *Hilary* Term, which he did not do, but came up now in this Term. *Heath* admitted that he had filed an affidavit of ignorance.

BAYLEY J. This is a sufficient answer to the irregularity.

Discharged.

INSURANCE.

DACOSTA *against* EDMUNDS.

1815.

14th April.

THE Attorney General moved to set aside verdict for the plaintiff and enter a nonsuit, on a point reserved in an action on a policy of insurance on casks of oil of vitriol, stowed on deck fore and aft; some were thrown overboard. He contended that it was necessary to communicate to the underwriters that they would be stowed on deck; and there is another method of stowing, to place them in a place parted off by the bulk head, and sunk in sand. There was an express agreement with the Captain that he should stow them on deck. Sometimes they are put in the boat on the deck, in sand. When stowed on the deck less freight is paid. It was proved, that in other cases the place where the commodity is to be stowed on deck is mentioned to the underwriters, and policies were produced to shew that the place of stowage was mentioned in the policy on such goods. [ELLENBOROUGH C. J. Only one of the policies was so, before the policy in question.] [BAYLEY J. There was no evidence that it was the usage of the trade.] [ELLENBOROUGH C. J. said evidence was necessary. They should be stowed safely. *Haywood v. Rogers*, 14 *East*. I left it to the jury that it is not necessary to communicate this, for if it were it would then in all cases be necessary to communicate the mode of stowing.] The Attorney-General observed that in this case there was a directly different mode of stowing.

Underwriters are not entitled to notice of the part of ship where goods are stowed, whether on deck or otherwise, though goods were oil of vitriol, and different freight is payable according to the place where stowed.

LE BLANC J. said, of course they were lashed on board.

1814.

DACOSTA
against
EDMUNDS.

DAMPIER J. The circumstance of their being wickered shews they were sometimes stowed on deck, otherwise they would not be at the expence of wicker-ing them.

LE BLANC J. There was no evidence that a different premium is paid for the place where oil of vitriol is stowed, that might have made a difference.

ELLENBOROUGH C. J. difference perhaps in all places in a ship; some better: but not necessary to enter into the history of every nook and corner. This, in effecting a policy, would be impossible.

Rule refused.

INSPECTION OF DEEDS, &c.

HARRIS *against* ALDRIT.

1814.

14th Nov.

PEAKE, at the desire of LE BLANC J. repeated a motion which he had mentioned before to LE BLANC J. and moved for a rule *nisi* to produce to the plaintiff, and to let him take a copy of a mortgage deed, on which the action was brought. The plaintiff had been apprehended for felony, and his papers, with the deed in question, were taken, and were now in custody of a constable; and it was necessary to take a copy to declare.

Where the plaintiff, in an action on a deed, has had the same taken from him, under a warrant against him for felony, the Court will, on an affidavit of demand upon the magistrate and constable, direct them to give plaintiff a copy to declare on, and to produce the deeds on the trial, plaintiff undertaking to pay expences.

LORD ELLENBOROUGH C. J. We have not the third persons in whose possession the deed is before us.

Peake instanced that it was of course to grant a rule for lords of manors to permit the taking copies of the court rolls, and to inspect them; and a rule of this kind was communicated by Mr. Short, in the last reign, where a rule was granted to inspect the copies of writings, in whatsoever possession they might be.

LORD ELLENBOROUGH C. J. Customary tenants have some claim on the court rolls. Have you applied to the magistrate, and has he refused permission? As it is a new motion, you should have those facts.

PER CURIAM. The application has not been made for the copy; apply first, and tender the expence of making it.

Rule refused.

1814.

HARRIS
again!
ALDRIT.Deed in felon's
possession,
copy to be ob-
tained.

Afterwards on 23d *November*, 1814, *Peake* moved again, on an affidavit stating, that in obedience to the recommendation of the Court, application had been made to the constable who had possession of the deed, and to the magistrate who issued the warrant, with a tender of the expences of a copy; that the constable refused to deliver the original deed, or a copy, and referred to the magistrate, who also refused the same.

BAYLEY J. Rule *nisi* to be served on the magistrate.

Rule absolute
to magistrates
and constables
to produce deed
of felon in their
custody, on
paying ex-
pences.

Bayley, R. on 25th *Jan.* 1815, shewed cause, and the rule was made absolute, for a copy of the deed, and for producing the original on the trial of the action, plaintiff undertaking to pay the expence of the copy, and of producing the deed on the trial, which the Court said was reasonable.

1815.

ANONYMOUS.

3d *July*.

Rule for inspec-
tion of a lease,
in order to ob-
tain names of
witnesses, to
subpœna them.

MARRYAT shewed cause against a rule obtained by *Topping*, calling on defendant to produce a lease in his possession, in order that the plaintiff might ascertain the names of the witnesses, so as to subpœna them to prove the same in support of the action. He contended, that this was to obtain a discovery for which they ought to go into equity, where they would not obtain the names but upon the terms of not taking advantage of any forfeiture; and this Court has refused to grant such a rule, in order to enforce a penalty, though they will order the inspection of corporation books for the purpose of supporting a claim of right.

Topping was stopped by the Court. LE BLANC J. asked *Marryat* if he would admit the execution of the

deed, which he refused. Then the plaintiff must have his rule ; for he is a party to this lease, and he is entitled to an inspection of it.

1813.

ANONYMOUS.

Rule absolute.

RAMSBOTTAM *against* COOPER.

1814.

25th Nov.

THE Common Serjeant (*Knowlys*) shewed cause against a rule obtained by *Marryat*, for delivering the copy of a lease, warrant of attorney, and judgment thereon. Two years and half year's rent was due from *Lady Day* 1811 to *Michaelmas* 1813. An action of *assumpsit* for use and occupation was brought, and the lease was produced, and plaintiff was defeated on that account for the time the lease covered, and only recovered two years and a quarter's rent. The present action is for the other quarter, and for half a year from *Michaelmas* Term 1813. [BAYLEY J. The former action was for use and occupation.] [LE BLANC J. They now go for the time that the lease had to run.] Common Serjeant. It is not stated that there has been any demand of a copy of the lease. The parties have no privity ; and the lease would therefore be submitted to those who have no privity, thus shewing the title to them.

The Court will confine their order for inspection of a deed, to particular parts of it.

LE BLANC J. The lease is now at an end. We may restrain their inspection to that part of the lease only which is necessary for them to have to bring their action on.

ELLENBOROUGH C.J. We will attend to any terms you may wish to impose on them.

BAYLEY J. They need only give you the date, term, and covenant to pay rent.

1814.

RAMSBOTTOM
against
COOPER.

ELLENBOROUGH C. J. The communication may be as penurious as will be necessary to satisfy this rule. You may put paper over the top and bottom, and shew them only the part they want.

Rule absolute.

INTEREST.

BISHOP *against* BEST.

1818.

20th Nov.

ESPINASSE shewed cause against a rule which had been obtained by *F. Pollock*, for a reference to the Master to calculate interest upon a judgment recovered in an action upon a bill of exchange. It was admitted that interest might be given in an action upon the judgment (b), but it could not, it was insisted, be given on motion. An action upon a judgment is watched jealously by the law. Thus, by the statute for preventing vexatious arrests, the plaintiff is not entitled to costs, unless the judge certifies (c).

Court will not grant a rule to compute interest on a judgment, in an action upon a bill of exchange (a).

Pollock urged, that the Court had clearly a discretionary power of granting the rule. The facts are left in the discretion of the Court.

PER CURIAM.

Rule discharged.

(a) Where an action is brought on a bill of exchange, the Court will grant a rule to compute principal and interest on the bill, though the plaintiff died after interlocutory judgment signed. *Borger v. Green*, 1 M. & S. 229; and see *Brown v. Messiter*, 3 M. & S. 281, where the bill was lost, and the Court granted the rule upon the production of a copy of the bill, verified by affidavit of the plaintiff's attorney, the original having been stolen from his pocket. But in *Nelson v. Sheridan*, 8 Term Rep. 395, the Court refused a rule to compute interest on a judgment, and to ascertain the damages sustained by the plaintiff by reason of the detention of the money recovered.

(b) *Vide, M'Clave v. Dunkin*, 1 East, 436.

(c) 43 Geo. 3. c. 46. sec. 4.

1817.

20th June.

VERNEY *against* IDDINGS.

Interest recoverable in an action of debt. *Semb.*—particularly where there is a covenant for interest, and at all events, would be given as damages for detention of the debt. *Semb.*—The demand of principal and interest by the declaration is divisible.

BAYLEY, *R.* in support of a demurrer in an action of debt on a mortgage deed, upon a covenant therein for payment of 886*l.* and interest, alleged to amount to 940*l.* The special demurrer assigned for cause, that 940*l.* were alleged to be due and owing; and such sum could not be due, because the date of the deed as shewn was the 20th of *January*. First objection, Action will not lie for interest. [PER CURIAM. Then the Court will give judgment for 886*l.* and damages for detention.] Bayley, *R.* submitted, that as the plaintiff declares for one entire sum, the Court cannot divide it. Second objection, that there was only a covenant to pay interest upon *February* 1817.

LORD ELLENBOROUGH C. J. He does not shew by the declaration from what time the interest begins: it may be for an old debt.

BAYLEY J. The declaration claims 886*l.* and plaintiff is not bound by the statement at the commencement of the declaration of a plea that he render 940*l.*; that has been held not to tie down the plaintiff (*a*): and if it appear on the declaration that the same certain debt is demanded, it is sufficient.

HOLROYD J. Have you any case to shew that interest cannot be recovered in an action of debt where there is a covenant to pay it?

PER CURIAM. This is a general demurrer, and you must shew that no judgment can be given upon the declaration, and that nothing can be recovered. The

demurrer is too extensive. If the interest is uncertain, the Court will only give judgment for 886*l.* and then there will be an application to the Court to refer it to the Master to compute the principal and interest, and the interest will be given not as interest, but as damages for the detention of the debt; and so the interest, if uncertain, and therefore cannot be recovered as interest, will be made certain, and reserved as damages.

1817.

VERNEY
against
IDDINGS.

^{*}
BAYLEY J. The demand is divisible.

Richardson, amicus curiæ, said, that there had been a case in the last sessions before the House of Lords, in which they had held that interest was recoverable in an action of debt.

LORD ELLENBOROUGH C. J. asked the name of the case; and BAYLEY J. said, that interest would be recovered if the principal was paid.

Judgment for plaintiff.

IRREGULARITY.

1814.

28th May.

HOMPAY against KENNING.

Irregularity in process, on the ground of a variance between the return of the writ and the day in the notice to appear, cannot be taken advantage of after plaintiff had filed common bail, and also filed a declaration in the office, and given notice thereof to the defendant.

COMYN obtained a rule, calling upon the plaintiff to shew cause why the writ and subsequent proceedings should not be set aside with costs, for irregularity, for a variance between the return and the day of the notice to appear at the bottom of the writ.

Abbott, in shewing cause, insisted that the application was made too late. The facts were, that the writ was returnable the 2d of *May*. The defendant not appearing on the 11th, the plaintiff filed common bail for him, according to the statute. He relied that in the case of an irregularity the party must come in the first instance, and if another step is taken in the cause, it is a waiver of the previous irregularity. He said it might be doubtful whether the act of filing common bail was such a step; but he contended that what the plaintiff had subsequently done was a waiver of it, namely, that the plaintiff had filed a declaration, and given notice of it to the defendant.

LE BLANC J. the only judge in the Court, was of opinion that it was a waiver, and discharged the rule with costs.

MINSTER *against* COLES.

1820.

4th Feb.

THE writ in this case being returnable on the last return of *Michaelmas* Term, the plaintiff declared *de bene esse* in the vacation, and in this Term gave notice of executing a writ of inquiry.

E. Lawes now moved to set aside the service of the declaration, upon the formal objection, that on process returnable on or after the last return of a Term, the plaintiff cannot declare *de bene esse*; but

Where the defendant laid by until he received notice of executing a writ of inquiry, and then came with a formal objection to the declaration, delivered *de bene esse*, the Court said he came too late.

THE COURT said he was too late in his application; for although the defendant might not be affected until the plaintiff proceeded to the execution of the writ of inquiry, yet knowing of the objection before, and having suffered the plaintiff to incur further expences, the irregularity complained of was not available.

Rule refused.

ANONYMOUS.

1814.

24th Jan.

COMYN shewed cause against a rule obtained by *Reader*, to set aside the proceedings for irregularity, on the ground that no *latitat* had been issued. The defendant was served with a copy of a *latitat* in *Easter* Term last, and the declaration was of *Trinity* Term 1813, and the defendant had laid by till the present motion. *Comyn* contended that the irregularity had been waived; and proved, by affidavit, that the plaintiff had his former attorney's bill, in which a *latitat* was charged.

Proceedings set aside for irregularity, where no *latitat* was issued, notwithstanding three terms delay in moving the Court.

But LE BLANC J. said that the Court would not sanction any party in such a proceeding, in which they had gone on without a *latitat*, and also that they

1814.

ANONYMOUS.

did not even now shew that a *latitat* had been sued out. And as to the plaintiff's having paid for a *latitat*, it made no difference, for in fact none was taken out; and though that appeared to be the fault only of the attorney, yet the party must answer for the improper conduct of his attorney, whose acts are in fact his.

Rule absolute.

1814.

9th May.

HARVEY *against* BENNETT.

It is not necessary to use the term 'irregularity,' in a rule to set aside the proceedings for irregularity; and irregular notice at the bottom of the copy of a writ, is not a ground to set aside the writ, but only the copy.

JERVIS shewed cause against a rule of *Best*, to quash a bill of *Middlesex*, the notice having the date in figures. He contended that it was not stated on the rule that it was moved for irregularity, and that the rule should have been to quash the copy, and not the writ.

LORD ELLENBOROUGH C. J. I do not see that it is necessary to use the term 'irregularity' on the rule, if it appear on the affidavit.

PER CURIAM. We can only quash the copy.

Rule discharged.

1814.

10th Nov.

ANONYMOUS.

No date to the notice of the declaration is necessary.

E. LAWES moved to set aside proceedings for irregularity, there being no date to the notice of the declaration.

DAMPIER J. It is immaterial.

Rule refused.

MULLETT *against* ALEXANDER.

1814.

29th June.

HOLT shewed cause against a rule of *Andrews*, to set aside the proceedings for irregularity ; which was, that the attorney's name was not indorsed on the writ, nor was there any date to the same. *Holt* said the motion was too late,

Andrews contended that the statute made the process void, and therefore no delay could cure it. After some discussion on the point of delay,

Rule absolute.

A statute, making the process, on which the attorney's name and date are not indorsed, actually void ; it is no objection to a motion that it has been made too late.

ANONYMOUS.

1814.

27th Jan.

READER moved to set aside proceedings for irregularity, stating that an old copy of a writ had been used, with the names of clerks of the Court subscribed, who were no longer so.

Improper names of clerks on an old copy of a writ, are immaterial.

BAYLEY J. That is an immaterial part.

Rule refused.

ANONYMOUS.

1815.

8th May.

COMYN shewed cause against a rule to set aside judgment for irregularity, which had been signed as for want of a plea. The action was on a judgment recovered, and the plea was *nil debet*. *Comyn* contended that it was a nullity. But the Court asked what authority he had for that.

Nil debet to an action of debt on a judgment, though a bad plea, is not to be treated as a nullity.

And LORD ELLENBOROUGH C. J. said, that though it was a bad plea on special demurrer, it was not a nullity ; and under such a plea, payment might be given in evidence ; and it was so held by Lord *Mansfield*.

Rule absolute.

1815.

8th June.

Wrong name
in process
cured by an
attorney's un-
dertaking to
appear.

LOWES *against* NEWCOMBE CLARKE.

P*ETIT* moved to discharge proceedings ; the copy of the writ was against the defendant by the name of *Thomas Clarke Newcombe*, and the declaration was against *Henry Clarke Newcombe*, sued by the name of *Thomas Clarke Newcombe*, and the defendant's attorney had indorsed on the writ an undertaking to appear. The defendant gave the plaintiff notice, that if he proceeded in this writ it would be at his own peril, and then the plaintiff entered an appearance by his right name. He cited 10 *East*, 328. 11 *East* 225 ; and he contended, the undertaking was only to appear to the writ ; and it did not appear that the attorney at that time knew the name of his client. But *BAYLEY J.* thought the undertaking was a waiver of the defect.

Rule refused.

1813.

28th June.

ANONYMOUS.

Irregularity in
issuing an exe-
cution for da-
mages and
costs in original
action, omitting
costs in error
cannot be ob-
jected to.

A*BBOTT* shewed cause against a rule obtained by *E. Lawes*, to set aside execution on two *scire facias*, one to revive judgment in an original action, the other to revive judgment in error for the costs in error. The *feri facias* which had issued on the first *scire facias*, and to set aside which this motion was made, had been taken only for the damages and costs in the original action, and did not include the costs in error.

Lawes objected to this mode of splitting the judgment, and so putting the defendant to additional expence and trouble.

LE BLANC J. said that the objection must arise when they take out execution for the costs in error, but not otherwise ; for the plaintiff is not obliged to issue execution for those costs.

ANONYMOUS.

1818.

28th Nov.

Rule to produce the record supported, where a perfect issue was taken, and no costs given where the rule was opposed in the first instance (a).

PARKE J. shewed cause in the first instance against a rule obtained by *Chitty*, to set aside a rule to produce the record. The defendant had pleaded a judgment recovered, to which there was a replication of *nul tiel* record, with a verification and prayer of damages, and a rejoinder entered for the defendant that there was such a record, and a day was given for its production. The defendant struck this out, and returned the paper book, with notice that he would rejoin in due time.

Chitty, in support of the rule, cited *Cremer v. Wickett* (b), *Sandford v. Rogers* (c), *Tidd's Practice* (d), and observed, that the defendant could not be allowed to rule the plaintiff to produce the record in a case of this nature.

BAYLEY J. This is an irregularity on the part of the defendant; when judgment was pleaded on one side and denied on the other, there was a fit issue, and it was not competent to the defendant to rejoin any other matter. As the rule was opposed in the first instance I cannot give costs. I wish I could.

Rule refused.

(a) To a replication of *nul tiel* record, and a day given, if the defendant demur, the plaintiff need not join in demurrer; but if the record is not produced, may sign judgment. *Tippling v. Johnson*, 2 Bos. & Pul. 302. And see *Myers v. Kent*, 2 New Rep. 466. There is a distinction between concluding a replication of *nul tiel* record, by giving the defendant a day to bring it in, or with an averment and prayer of the debt and damages. In the former case, the issue is complete upon the replication; but in the latter there ought to be a rejoinder that there is such a record. *Cremer v. Wickett*, 1 Lord Raymond, 550. *Tidd. Pract.* 6th ed. 798. *Chitty on Plead.* 1 Vol. 571.

(b) 1 Lord Raymond, 550.

(c) 2 Wils. 113.

(d) *Tidd. Pract.* 6th ed. 798.

1. T. 54. G.

SIMMONS against COPE.

The order in the margin of the paper-book is peremptory, and it must be returned within the 24 hours, and though it be returned before judgment signed, yet the judgment is regular if signed after the expiration of the 24 hours.

CURWOOD moved to set aside a judgment signed for not returning the paper book. The paper book had been delivered; with the regular notice to be returned within twenty-four hours. It was not returned within twenty-four hours, nor for two hours after; but when it was returned no judgment had been signed, but the plaintiff did it afterwards; and it was now moved to set aside that judgment as irregular.

LE BLANC J. asked if there was any case on the subject.

Curwood said he could only find the rule laid down generally, that the paper book should be returned in twenty-four hours, but that in the case of a demand or a plea the defendant is bound to plead within twenty-four hours; but if he does not do so, but in fact pleads before judgment is signed, the plaintiff cannot afterwards sign judgment: and he contended that the present case was analogous. But

LE BLANC J. said the case was different, and the order in the margin of the paper book was peremptory, and that the rule must be refused; but added, that if there was any authority to be found, the case might be moved again.

PER CURIAM.

Rule refused.

JUDGMENT.

RUCKER *against* ANSLEY.

1820.

11th Feb.

THIS was a motion for judgment as in case of a nonsuit. The cause was set down for trial by a special jury for the sittings at Guildhall, so long ago as *Hilary* Term 1816, but the plaintiff had never applied for an appointment to have the cause tried. The action was upon a policy of insurance, and it appeared that there had been another action tried upon the same policy, in which the plaintiff was nonsuited; but the Court had reserved a case, in which judgment was given in *Michaelmas* Term, 1817. Carr now shewed cause against the rule for judgment as in case of a nonsuit in this case, and contended, that as the cause had in point of fact been set down for trial, the defendant could not sustain this application.

Where a special jury cause had been standing in the paper for three years, without any appointment applied for to have it tried, the Court refused to give the defendant judgment as in case of a nonsuit.

HOLROYD J. concurred in this objection, and said, that the proper course was for the defendant to apply to the Lord Chief Justice, to have the cause appointed for trial.

F. Pollock for the defendant.

Rule discharged.

1820.

*Saturday,
12th Feb.***WALTER against BUCKLE.**

Where issue was joined, and there is a rule to enter the issue, and notice of trial is given in one and the same Term for the adjourned sittings after that Term, and the plaintiff does not go to trial at those sittings, the defendant is entitled in the following Term to judgment as in case of a nonsuit; and if no reason is assigned for not going to trial, the Court will not compel the defendant to accept a peremptory undertaking.

RULE for judgment as in case of a nonsuit. Issue was joined last *Michaelmas* Term, and a rule to enter the issue being taken out in that Term, notice of trial was given for the adjourned sittings after the said Term; and the plaintiff not having proceeded to trial at those sittings, the question was, whether the defendant was entitled to move for judgment as in case of a nonsuit.

THE COURT said he was; and as no reason was assigned for not going to trial, the defendant could not be compelled to accept a peremptory undertaking at the sittings after this Term.

Rule absolute.

Comyn for the plaintiff and *Chitty* for the defendant.

LANDLORD AND TENANT.

SKERRY *against* PRESTON.

1813.

11th Nov.

JEKYLL moved on behalf of the plaintiff to set aside a verdict for the defendant, and for a new trial in an action on the case for taking a distress for rent where no rent was due. The defendant had agreed to receive interest on the rent in arrear. The distress was taken October 6th, 1812, for three years and a half rent. For the plaintiff it was contended, that the agreement to receive interest on the arrear of rent had converted the rent into a loan, and determined the right to distress.

An agreement to take interest on rent in arrear, does not take away the right of distress.

LORD ELLENBOROUGH C. J. This is only an agreement for that which the law would have given him: where the money is payable on a particular day, the jury would give interest as damages.

Burrows contended, that where money was payable under a written contract, it must be discharged by deed of as high a nature; but here the money accrued due in consequence of the occupation.

BAYLEY J. Suppose no rent was due, is case the proper remedy? The defendant could not distress for the interest, but he had a right to abandon the interest and take a distress for the rent.

ELLENBOROUGH C. J. There is here no suspension

1813.

SEFERY
against
PRESTON.

of the distress, only an agreement to pay that which the law would give him ; and the landlord at any time had a right to determine his forbearance and distress for the rent.

Rule refused.

1813.

9th Nov.

BURBAGO and another against KING.

Manure is assign-
 able by the
 tenant, though
 he thereby sub-
 jects himself to
 an action.

CLARKE moved for a new trial on an action for the price of manure sold, tried at *Lincoln* before **THOMPSON**, Baron. in which the verdict was for plaintiff, damages 40*l*. There was an assignment by a tenant of land, of his stock and manure to the plaintiffs, as trustees for creditors, and who took possession and sold every thing but manure. The defendant, who had had a previous assignment of the lease and manure, took possession under his assignment, and spread the manure on the land. *Clarke*, for the defendant, contended, that the manure was not assignable to the trustees, for it would be contrary to good husbandry.

ELLENBOROUGH C. J. said, the tenant might assign it, and pass the legal property therein to the purchaser, though he would thereby make himself liable to an action for bad husbandry. The assignment to defendant was before the assignment to plaintiffs; but defendant neglected to take possession till after plaintiffs had taken possession, and their right to the moveable property therefore could not be disputed. Defendant must pay the value of the manure to the plaintiff, and bring his action of covenant.

Rule refused.

REID *against* PARSONS.

1817.

7th Feb.

GIFFORD stated that this was a demurrer to a plea to a declaration in covenant, for nonpayment of rent. Defendant pleaded that the lease had become void by the breach of a covenant therein. The question arose upon a lease which contained a proviso that the term should cease upon the nonpayment of the rent; and the question was, whether the defendant, who was in that lease the surety of the lessee, could take advantage of such a termination of the lease by the nonfeazance of the lessee, and by his wrongful act in not paying the rent. *Gifford* contended that this was the contract of the lessor; and if he made such a contract, he must abide by the consequences; and that the consequence of such a clause was, upon the nonpayment of the rent, to make the deed absolutely void by the express provision, and not merely voidable, which the party must contend on the other side in order to support their view of the case; and that here the defendant was not the lessee, but only the surety of the lessee, and therefore it was not his own wrongful act that had occasioned the determination of the lease.

Where there is a proviso in a lease, that upon nonpayment of rent by the lessee, the term should cease, the lessor and not the lessee, has the option of determining the lease, upon the breach of such proviso.

LORD ELLENBOROUGH C. J. That makes no difference; the surety is identified with the lessee; it is just the same.

ABBOTT J. In the case of *Moyle and Finch*, the auditor of the Crown gave the acquittance, and not the King himself.

THE WHOLE COURT thought that it must be the evident intention of the parties that the lease should only be void at the option of the lessor, and that it

1817.

REID
against
PARSONS.

never could have been intended between them, that the lessee should have the option of putting an end to the lease by his own default, and that his surety should answer an action for the rent, by saying that the lease is void, because the rent has not been paid; and BAYLEY J. said, if this doctrine should prevail, if there was a proviso that the lease should be void for non-repair, if a gate was out of repair, the lessee would be able to defeat the lease; and LORD ELLENBOROUGH C. J. said, that the lessee never could take advantage of his own wrong, to discharge himself from a duty.

Richardson was stopped by the Court.

LORD ELLENBOROUGH C. J. said, that the Court had looked into the cases, and thought the lease void, as against the lessee, but not as against the lessor, for the benefit of the lessee; and that it was so in many other leases, even when made voidable by statute, as an ecclesiastical lease. But it cannot be vacated by any party by his own act, done in contravention of the lease; and a party cannot take advantage of his own wrong to defeat the lease. *Co. Lit.* 216. which shews that the general rule is, that a party cannot take advantage of his own wrong.

Judgment for plaintiff.

LIMITATIONS, STATUTE OF.

HURST *against* PARKER.

1817.

8th Nov.

RICHARDSON moved for a new trial, and to set aside nonsuit in *tort*, for taking away plaintiff's coals; plea, statute of limitations. Plaintiff proved subsequent admission by the defendant of trespass, and contended that it was the same as subsequent promise in *assumpsit*. *Richardson* now contended the same, and cited *Haye v. Hastings, Ld. Raym. 389. — v. Tapper, 16 East, 420*. But THE COURT thought this case of trespass was not like *assumpsit*, where the new promise is a new cause of action, and here the admission is only of a cause of action at the time, and *non constat*, but statute applied afterwards, and the affirmative that the cause of action was existing at the time lay on the plaintiff.

Subsequent admission of having committed a trespass, will not take the case out of statute of limitations (a).

Rule refused.

(a) S. P. in *assumpsit* or case against an attorney for negligence. *Short v. McCarthy*, 3 B. and A. 626.

MANDAMUS.

1820.

8th Feb.

Ex parte MORGAN.

The Court of K. B. will not interfere by *mandamus*, to compel a court of inferior jurisdiction to grant a new trial in a cause before it, in which alleged injustice has been done to one of the parties.

CHITTY moved for a rule to shew cause why a *mandamus* should not issue, directed to the judge of an inferior Court of competent jurisdiction, commanding him to award a new trial in a cause before him, in which one *Morgan* was the defendant. The application was grounded on an affidavit that gross injustice was done the party ; and although no authority could be cited in support of the motion, yet it was contended, that as this Court exercised a general jurisdiction and superintendence over the proceedings of inferior tribunals, it could command a Court of inferior jurisdiction to do justice to the suitors thereof, or correct any irregularity in its proceedings.

PER CURIAM. We may command the judge of an inferior Court to give judgment in a matter fit and proper for his cognizance ; but we cannot in this manner review his proceedings, or try upon affidavit, any alleged irregularity in his judgment. If there is an erroneous judgment given, a writ of error will rectify it, if error lies ; but we cannot tell the judge what he is to do. We can command him to give judgment, but we cannot interfere to regulate the practice of an inferior Court, because every inferior Court is the proper judge of its own practice. Unless some authority is cited to justify this motion, we cannot interfere in the way required.

Rule refused.

ANONYMOUS.

1814.

16th Jan.

ABBOTT moved for a *mandamus* to the surveyor and commissioner under an inclosure act, to ascertain the value of a *modus*; he proposed to take the rule in the alternative, "if there was any *modus* to fix the value."

Mandamus granted to the commissioners of an inclosure act, to inquire if there is any *modus*.

LORD ELLENBOROUGH C. J. Have you any precedent for such an hypothetical *mandamus*? if you have the rule at all, you must take it in the first instance to enquire if there is any *modus*.

Abbott adopted this form for his motion.

Rule *Nisi* granted, to be served on the vicar or his impropriator.

DAMPIER J. said, that always before the inclosure acts are passed, it should be ascertained whether there is a *modus* or not; for otherwise, the incumbent who may have a large family will be obliged to litigate it, whether he will or not, and he may not be able to bear the expence.

REX against COMMISSIONERS of the FLOCKWOLD INCLOSURE.

1817.

23d Jan.

DENMAN shewed cause against a rule of E. Lawes, for a *mandamus* to a commissioner of an inclosure act, to effect an exchange. He stated the exchange clause. One has an estate in fee, the other only for life. He objected that Mr. Newcombe was only tenant for life, Gore tenant in fee. This exchange is intended to give them both in fee.

In a motion for a *mandamus*, the Court will not grant the writ where discretion was given to the commissioners and they had exercised it, and no ground be shewn that they have done it wrongfully. "Shall and Exchange,"

BAYLEY J. Is this application by Gore? may," are only imperative when the clause is for the public good or benefit. imports equality of interest.

1817.
 ———
 REX
against
 COMMISSION-
 ERS of the
 FLOCKWOOD
 INCLOSURE.

Marryatt. Both *Newcombe* and *Gore* apply to the commissioners to effect it, and they the commissioners refuse.

Denman. The commissioners have a judicial office, and they said that exchange was most unfair; as for *Mr. Newcombe*, his family would lose 200*l.* It was only a matter of favor, where the estates were of a different degree. The commissioners' affidavit shews that they cannot conscientiously do it.

Marryatt. It is desirable to both parties to effect this. *Gore's* land intersects *Newcombe's*.

BAYLEY J. Without the commissioner, you may exchange for *Newcombe's* life.

LORD ELLENBOROUGH C. J. Do you mean to say that your affidavit states that the value is equal?

BAYLEY J. Who is to take care of your remaindermen?

LORD ELLENBOROUGH C. J. Have you any case that shews that this Court will grant a *mandamus* where a conscientious duty is left to the commissioners, when you do not shew equality of interest or value? It would be subjecting the consciences of the commissioners to a *mandamus*.

BAYLEY J. Are there any words that are necessarily imperative on the commissioners?

Marryat. "Shall and may" have been held imperative.

BAYLEY J. They are not the words here.

Marryat. "May," has been held "must," and a person held indictable.

HOLROYD J. That is where it is for the public good; as a churchwarden to make a rate.

Marryat. Here the words are "shall and may be lawful."

BAYLEY J. That is limited by the word exchange, that imports equality of interest. A tenant for life cannot exchange without tenant in fee.

LORD ELLENBOROUGH C. J. How does it appear that this statute was ever intended to allow a commissioner to effect such an exchange as this? It would be most grievous to the remainder-men, if they could. "Shall and may" where they are for the public good, may be held imperative; but not so in a case like this.

Rule discharged.

ANONYMOUS.

WARREN moved for a *mandamus* to be directed to the Dean of *Hereford*, to examine and licence a second curate, on an affidavit that one curate was not sufficient, and that another should be appointed by the incumbent, and approved of by the parishioners, and to be paid by them, and also to enquire into the party's sufficiency. The Dean refused to enquire into his sufficiency.

LORD ELLENBOROUGH C. J. said that there did not appear to be any such office as a second curate, and that there was no trace of any thing of the kind in the books, and that the Court could not grant a *mandamus* for an office *in fieri*.

Rule refused.

1817.

REX

against
COMMISSIONERS of the
FLOCKWOOD
INCLOSURE.

1816.

13th May.

Mandamus refused to be directed to a dean to license a second curate.

1814.

ANONYMOUS.

31st Jan.

Mandamus lies to a clergyman to replace a clerk of the parish.

The affidavit for the *mandamus* should state, that the clerk was appointed for life; but it is not absolutely necessary.

PEAKE moved for a *mandamus* to a clergyman to replace the clerk of the parish, whom the clergyman discharged.

LE BLANC J. asked if it was sworn in the affidavit that he was appointed for life? [*Peake*. It only states generally that he was appointed; but it has been held that he is appointed for life.]

LE BLANC J. It has been so held, but it is usual to state it in the affidavit.

Writ granted.

1815.

ANONYMOUS.

12th June.

A *mandamus* to the archdeacon to swear in the churchwarden duly elected, absolute in the first instance.

READER moved for a *mandamus* to the archdeacon, to swear in a churchwarden who had been duly chosen.

PER CURIAM. As it is only to swear in, which does not confer any title,

Rule absolute in the first instance.

1818.

ANONYMOUS.

20th April.

If one parish officer applies for a *mandamus* against another to concur in rate, yet writ must be against both, as well against the applicant as the other.

SCARLETT moved for a *mandamus* against one of the churchwardens of the parish of *Esham*, to concur in a rate with the overseers.

PER CURIAM. You must take the *mandamus* against the whole of the parish officers; against yourselves as well as the other overseer. It has often been so done.

Rule *Nisi*.

ANONYMOUS.

1816.

15th June.

THE Attorney-General moved for a *mandamus*, to be directed to the churchwardens of *St. Paul's, Deptford*, to command them to give up the custody of the vestry book to the vestry clerk, the book having been taken away by violence at a vestry meeting. [LORD ELLENBOROUGH C. J. enquired what tenure the vestry clerk had in his office.] The Attorney-General alluded to *Rex v. Croydon*, 5 T. R. being an application for the restoration of a vestry clerk.

Mandamus to the churchwardens, to deliver a vestry-book to the vestry-clerk, refused.

LORD ELLENBOROUGH C. J. If the muniments belonged to him as annexed to his office, he may bring an action of detainer or trover.

Rule refused.

ANONYMOUS.

1814.

16th Nov.

TADDY moved for a *mandamus* to certain persons, to deliver up the keys of a church to a person who had been appointed sexton, after a contested election with the late sexton's son, who was an unsuccessful candidate, and now performed the office, the keys having been delivered to his mother, the executrix of the late sexton, to whom the churchwardens had delivered the keys. In the case of *Rex v. Churchwardens of Taunton, St. James's, Cowp.* 413. the *mandamus* was to the churchwardens.

Mandamus to deliver up the keys of a church, refused.

LORD ELLENBOROUGH C. J. Why did they not get a new key? The keys of the church are not like an emblem of office, or the like. If it is likely to prevent any breach of the peace, we would grant it; but you had better get a new key.

Rule refused.

1818.

25th May.

Rule nisi for a mandamus to pay poor rate, though defendants had had distrainable goods, it being sworn that the goods were fraudulently leased, and that the parish would be driven to try an action on the ground of the fraud.

**REX against THE COMPANY of the PROPRIETORS of
MARGATE HARBOUR.**

GURNEY moved for a *mandamus* to the company, to pay the poor's rate. [LORD ELLENBOROUGH C. J. Why cannot you distrain?] Gurney. I made the motion two years ago, and that objection was then made to it, in consequence of which we distrained; the goods were bought in by the clerk of the company, to whom a lease of all the distrainable property, which consists only of cast-iron benches, windlass, &c. on the pier, has been made to the clerk of the company. [LORD ELLENBOROUGH C. J. You mean to say that the lease is fraudulent; you must proceed then on the assumption of that fraud, and distrain the goods]. Afterwards

LORD ELLENBOROUGH C. J. said, as such a proceeding might involve the parish in an expensive action, perhaps the facts which you have shewn to the Court are sufficient to induce such a presumption of fraud as to justify the Court in granting a rule nisi, in order to bring the question so far under discussion as to induce the parties to do what they ought.

Rule Nisi.

1817.

19th May.

REX against THE MAYOR of BRIDGWATER

The Court refused to fix any day for an election on a *mandamus*. They left it to the proper officer.

GASELEE moved for a *mandamus* in the first instance, on the ground that the offices of Burgeses and Aldermen were actually vacant.

Williams, C. F. prayed the Court that a late day in the next Term might be fixed for the election, on affidavits that some of the corporation were abroad; but

LORD ELLENBOROUGH C. J. said, that the Court would not fix any precise day, they would leave that to the chief officer to do; and if he did wrong, they might come to the Court to oblige him to act properly.

1817.

REX
against
THE MAYOR
OF BRIDG-
WATER.

Rule absolute.

REX against MAYOR of TRURO.

1816.

18th Nov.

GASELEE moved for a *mandamus* to proceed to the election of a mayor, there being no mayor for the years 1815 and 1816, and no election having taken place either on charter-day, or in pursuance of 11 Geo. 1.

Court will grant rule absolute in the first instance, where a mayor holds over, or where actual vacancy occasioned by death (a).

BAYLEY J. granted a rule *nisi*; and upon asking whether there was an actual vacancy, or a mayor *de facto*, and *Gaselee* stating that the late mayor held over, **BAYLEY J.** granted the *mandamus*.

(a) S. P. in *Ikester's* case, on vacancy of the capital burgess, moved by *Merewether*, Hil. 1817.

ANONYMOUS.

1815.

9th Feb.

PULLER moved for a *mandamus* to two justices, to summon the Reverend Mr. — for not paying poor rates, six rates being in arrear. Application had been made to the two justices, and they had refused.

Mandamus to magistrates to summon person for not paying poor rates.

Rule granted.

REX against JUSTICES of WILTS.

1818.

10th Feb.

CASBERD moved for a *mandamus* to dismiss appeal, and that in the mean time all proceedings to be stayed.

Mandamus to dismiss an appeal refused.

1818.

Rex
against
JUSTICES OF
WILTS.

HOLROYD J. Is there any case in which this Court have interposed to dismiss an appeal? It is in effect to say that they have no jurisdiction.

ABBOTT J. said, that he and HOLROYD J. (the only two Judges in Court) thought they could not grant such a rule, but gave *Casberd* leave to mention it again to-morrow, when the Court was full, without prejudice.

Casberd on the following day renewed his application. He stated that there was an appeal at the *Midsummer* sessions called on at *Michaelmas* sessions. There was a proposal then to refer, and consented to, certainly on the understanding that the Court should adopt the decision of the arbitrators. They were to consider all legal objections. The umpire was at the bar. It was agreed afterwards that it should go before an umpire in the first instance. The arbitrator decided in favour of one of the parties. The arbitrator decided on the costs. The arbitrator had not decided the merits, he only decided that there was no notice of appeal.

BAYLEY J. Why did you appear at the sessions, if there was no notice?

Curwood. There might be a notice, but not a legal notice.

BAYLEY J. Do you know of any instance in which an application has been made to this Court on the ground that the sessions have done wrong?

LORD ELLENBOROUGH C. J. If we were to attend to your motion we should have an application to this Court whenever the parties thought the sessions had decided wrongly.

Curwood. We go on the ground that there is no other remedy.

1818.

REX
against
JUSTICES OF
WILTS.

BAYLEY J. There are many cases in which there is no other remedy against the sessions, where we should not interfere. There was a case here some time ago, where we had reason to think the sessions were wrong, but we refused to interfere.

LORD ELLENBOROUGH C. J. Our writs of error have accumulated, and this would increase them still more, if we were to entertain such applications in all cases where the sessions are thought to be wrong.

Rule refused.

MASTER AND SERVANT.

1818.

11th Nov.

CARR *against* CLARKE.

In order to maintain an action for seduction, the daughter must be the father's servant; and though he receives part of her wages, and she is under age, yet if she is not his servant, he cannot maintain the action (a).

THIS was an action for debauching the plaintiff's daughter; and at the trial before Mr. Baron WOOD, the plaintiff was nonsuited, on the ground that the daughter was not proved to be the plaintiff's servant. It appeared that she was sixteen years of age, and that the plaintiff her father, on removing from his residence, had left her behind with a relation, a Mrs. Shapert, in whose employment she was at the time of the seduction. The father, however, received from his daughter a part of the wages. Scarlett now moved to set aside the nonsuit, and have a new trial. He contended that there was in this case an *animus revertendi* on the part of the daughter; and that her father receiving part of the wages, and she herself being under age, there was sufficient evidence of service to maintain the action. *Dean v. Peel* (b), and other cases there cited, were contended to be distinguishable; the daughter, although under age, being actually in the service of another person, and having no intention of returning. In *Postlethwaite v. Parkes* (c), the daughter was in

(a) The injury done to the feelings of the parent, or person standing in *loco parentis*, are usually taken into consideration in estimating the damages although perhaps upon strict legal principles the damages could not be recovered beyond the loss of service. *Irwin v. Dearman*, 11 East, 23. The daughter or servant is a competent witness to prove the case, although it is not absolutely necessary that she should be called. *Farmer v. Joseph, Holt*, Ni. Pri. 451. The withholding the daughter, however, would probably furnish matter of observation.

(b) 5 East, 45.

(c) 3 Burr. 1878.

another service, and of full age at the time of the seduction. *Dennett v. Allcott* (d). "The rule that there must be a contract for service, is too narrow for the liberal sentiments of the present time. The slightest service has been held sufficient."

1818.

CARR
against
CLARKE.

ABBOTT C. J. Even making tea has been said to be an act of service. But here there was in fact a service with another person, who could undoubtedly have brought the action; and then there might be two actions. The declaration states that the injury was committed, "the party then being the daughter and servant of the plaintiff."

BAYLEY J. mentioned *Fores v. Wilson* (e). The cases go upon the express ground, that the relation of master and servant must exist; but the evidence may be very slight. The parties must stand in the relation of master and servant, although a temporary absence may not be sufficient to destroy that relation. If it had been established that Mrs. *Shapert* had paid the father the wages, perhaps the plaintiff might have succeeded.

ABBOTT C. J. This action is founded on the situation of master and servant, not upon that of parent and child. When the father is in a condition to bring the action, and the child is his servant, that circumstance may increase the damages; but we can go no farther. In this case, the allegation that the child is the servant of the plaintiff is not proved. She was the servant of another person.

BAYLEY J. was of the same opinion, and referred to *Saterthwaite v. Duersts* (f). The action is supported

(d) 2 T. R. 168. per Buller J.

(e) Peake's Rep. 55.

(f) E. T. 25 Geo. 3. K. B. 5 East, 47. c. 10.

1818.

GARR
against
CLARKE.

by the evidence of one of the criminal parties, and therefore should be kept within close bounds. The declaration must state that the girl was the servant of the plaintiff. Lord *Mansfield*, in the case referred to, after looking into the cases said, that the action would not lie, unless it was laid *per quod servitium amisit*.

Scarlett then observed, that *Woon, B.* was anxious that the motion should be brought before the Court. And,

ABBOTT C. J. observed, that it was very natural that any person should feel anxious, that the law upon this subject was rather different from what it is.

Rule refused.

1818.

11th April.

WELSH against LAWRENCE.

Master liable for accident in consequence of chain-stay of cart breaking, when horse ran away and damage was done, for his negligence, in not having the tackle good.

NOLAN moved to set aside a verdict for the plaintiff for the value of a horse killed by driving defendant's cart. He questioned whether the evidence supported the declaration, which averred, that the cart was under the management of the defendant's servant. The proof was, that going down the hill the chain-stay broke, and the defendant's horse was frightened and ran away. It was averred in the counts, that it was damage by the negligence of the servant.

LORD ELLENBOROUGH C. J. The master is bound to have good tackle, and is negligent if he does not.

BAYLEY J. If he is driving negligently as to the tackle, he is driving negligently.

Nolan. The question is, whether that is driving the horse negligently.

ABBOTT J. Clearly so.

Rule refused.

MONEY HAD AND RECEIVED.

ROBSON *against* ANDRADE.

1816.

12th Nov.

SCARLETT moved for a new trial.

The plaintiff, to recover his share of a stake from a stakeholder, must shew his exact proportion (a).

PER CURIAM. The plaintiff could not maintain his action against the defendant as a stakeholder, for the plaintiff's proportion of the sum deposited in the defendant's hands for the benefit of the plaintiff and others, without shewing the plaintiff's certain exact proportion.

Rule refused.

(a) Sec 1 *Stark*. 372.

MORTGAGOR AND MORTGAGEE.

1818.

26th Nov.

ANONYMOUS.

Rule granted for delivering up mortgage deeds on payment of debt, interest, and costs, in an action of covenant (a).

COMYN moved, in an action of *covenant* upon a mortgage deed (a), for a rule calling upon the defendant to shew cause why it should not be referred to the Master to ascertain what was due for principal and interest upon the deed on which the action was brought; and why, upon payment of principal and interest, together with the costs of the action, the mortgagee should not be directed to give up the mortgage deed to the mortgagor.

BAYLEY J. To grant this motion seems to be converting this Court into a Court of Equity. However, the rule *nisi* may as well be granted, as cause may afterwards be shewn.

THE COURT granted a rule *nisi*, which was afterwards made absolute, but without opposition.

(a) See statute 7 Geo. 2. c. 20. s. 2; and 7 T. R. 185; *Berther v. Street*, 8 T. R. 326. 410, where it was held that the Court may grant a rule for a reference to the Master to compute what is due for principal and interest, in an action of covenant; but it does not appear to have been usual to grant the rule in the extent to which it was carried in the principal case. The statute enacts, that where any action shall be brought on any bond, for payment of the money secured by such mortgage, or performance of the covenants therein contained; or where an action of ejectment shall be brought by any mortgagee, it shall be lawful for the party entitled to the equity of redemption, at any time pending such action, to bring into Court the principal money and interest, &c. and by rule of Court to obtain a reconveyance, &c.

MOTIONS.

PHILLIPS *against* WEYMAN.

1820.

12th Feb.

THIS was a motion for staying proceedings on payment of costs; and on a former day the case had been fully discussed by Counsel on both sides, and the rule discharged.

A rule once disposed of, after full argument, cannot be opened again upon a suggestion that new matter has since come to the knowledge of the party, which would alter the decision of the Court (a).

Abraham now moved to open the rule, on a suggestion that new matter had come to the knowledge of the agent in town, which would probably alter the former decision of the Court if the rule was again opened.

Campbell resisted the application, as being quite contrary to practice.

PER CURIAM. If we were to yield assent to this motion we should be called upon to discuss twice over almost every case which comes before us for decision. The time of the Court is abundantly too limited for the dispatch of ordinary business, and we have not leisure for works of supererogation.

Refused.

(a) See *Rex v. Sheriffs of Middlesex*, 1 Chitty, 445, rule of court and decisions; and *Tidd*, 7th ed. 528.

In re HELLYER and SNOOK.

1818.

12th Feb.

CHITTY had obtained a second rule to set aside an award, one having been obtained before and discharged.

The Court will not grant a second rule to set aside an award, when a rule for that purpose has already been discharged (a).

LORD ELLENBOROUGH C. J. If a rule has once

(a) See the last case, and note.

1818.

ANONYMOUS.

been obtained to set aside an award, we must assume that the objections taken on that rule are all that can be taken to the award.

1816.

2d July.

ANONYMOUS.

The Court will not, at the close of the Term, grant a rule nisi to shew cause at Chambers, where the party could have come earlier (a).

BAYLEY J. The Court will not, at the close of the Term, grant a rule nisi to shew cause at Chambers, if it is the fault of the party that he has not come sooner. The Court yesterday said they would not, under such circumstances, add to the pressure of business at Chambers.

ABBOTT J. said the same the next day ; and added, that the practice of shewing cause at Chambers was quite modern.

(a) See *Tidd*, 7th ed. 518, 531.

NEW TRIAL.

HALL *against* STOTHARD.

1816.

See May

SCARLETT moved for a rule to shew cause why a verdict obtained for the defendant should not be set aside, on payment of costs, and a new trial granted. The cause was tried before the Lord Chief Baron at the Spring Assizes at *York*, when it appeared that the action was brought for refusing to receive some linseed, which the plaintiff had contracted to deliver within fourteen days, the price being payable at the time of the delivery. A portion of the linseed had been delivered, and the question was, whether the defendant was obliged to receive the remainder; an alteration had taken place in the price of the article. The action was resisted, on the ground that the defendant had applied for the delivery of the remainder of the linseed, and that the answer was, that plaintiff had not got it all to deliver. It was now observed, in support of the motion for a new trial, that the plaintiff's clerks, to whom this application had been made, were in Court, and the plaintiff's attorney wished them to be called; but that the counsel declined to pursue that course, and that ultimately the verdict passed for the defendant.

A client is bound by the conduct of his advocate, and the Court will not grant a new trial on the ground that the witnesses were not examined by counsel, according to the request of the attorney (a).

LORD ELLENBOROUGH C. J. The client must be bound by the conduct of his counsel, otherwise there would be no end to applications to the Court for new trials. Where the parties wish one course to be adopted, and the counsel take another, the parties must nevertheless abide by the acts of their counsel, however contrary to their wishes.

Rule refused.

(a) *Tidd*, 7th ed. 913.

1815.

15th April.

An admission by jurymen, made after they have separated, though on the day of trial, is not a sufficient ground for a new trial (a).

DAVIS against TAYLOR.

PARKE moved to set aside a verdict for the defendant, on affidavits that there was a conversation with jurymen, that the verdict was entered by mistake, and there were two persons who overheard it the same day, after the cause was tried. [LORD ELLENBOROUGH C. J. That will not do, unless it was at the time, and a part of the transaction, and whilst the jury were together.] Parke. Most of the cases in which an application of this nature has been refused, has been where the conversation has happened some time after the trial; but here it was on the same day.

LORD ELLENBOROUGH C. J. It must be whilst the jury are together; otherwise we should have all sorts of stories brought before us.

Rule refused.

(a) *Tidd*, 7th ed. 915, 6.

HODGSON against BARVIS.

New trial granted, on terms that costs should abide the event, where verdict of jury was per-verse.

SCARLETT shewed cause against a rule of *Raine*, for a new trial in this case. The action was brought for fees due to plaintiff, as steward of a court, against the defendant, as one of the customary tenants. *Scarlett* contended, that if the rule were made absolute, it should be with costs, which *Raine* opposed.

LORD ELLENBOROUGH C. J. said, that where there was any perverseness in the finding of the jury, the rule for a new trial had been made absolute, without costs; and he added, that when at the bar he had often obtained such rules on that ground, without costs. Eventually, he said that the costs should abide the event.

POTT against PARKER.

1818.

11th April.

VAUGHAN, S. moved to set aside verdict for plaintiff. There was a sale of wheat. The only question was, whether the price of it, 24*l.* odd, had been paid. There was contradictory evidence, and an indictment for perjury had been found against the witnesses for the plaintiff, and the character of the defendant was at stake.

That indictment for perjury found against witnesses who gave evidence, is no ground for Court to grant new trial (a).

LORD ELLENBOROUGH C. J. It was a question upon the credit due to the witness, and it was left to the jury. To grant a new trial, on the ground that an indictment for perjury has been found, would be new and dangerous. The only thing possible would be, to stay execution during the finding of the indictment for perjury; but that we cannot grant.

BAYLEY J. The defendant may establish his character on the indictment for perjury.

Vaughan. It will prejudice the indictment if there is no new trial.

LORD ELLENBOROUGH C. J. Your motion is sufficient to answer that; you have done all you could.

Rule refused.

(a) *Tidd*, 7th ed. 914.

GREATWOOD against SIMS.

1818.

22d June.

PARKE said this was an action on a surety bond. A verdict at the sittings after Term was found for plaintiff, the cause being undefended at the trial. The affidavit stated, that the cause was a long way off; it was called on, and the attorney not attending, it was undefended. That the defendant had a good defence, and was ready to pay the money into Court.

New trial for defendant, on affidavit of surprise, and on terms.

1813.

GREATWOOD
against
SIMS.

ELLENBOROUGH C. J. granted a new trial, on the terms that the money should be brought into Court, and that judgment should be given of the Term, in case plaintiff again obtained a verdict; and that defendant should forthwith pay the costs of the former trial, and of this application.

1813.

16th Nov.

HOLWORTHY *against* RICHARDS.

Where an issue was from Chancery, the motion for a new trial may be made in this Court, the Judge on the trial having given leave to move (a).

BLOSSETT moved to enter verdict for the plaintiff. This was an issue from Chancery.

LE BLANC J. Should you make the motion here? It is usual to make it in the Court of Chancery.

ELLENBOROUGH C. J. said that was the common practice.

DAMPIER J. said he had known many such applications made to Lord *Erskine*.

ELLENBOROUGH C. J. You may apply to the Chancellor, and if he thinks we should grant a new trial, we will hear you even after the four days have elapsed.

Blossett stated that those who had the conduct of this cause in Chancery thought, that as the leave was given by the Judge at the trial to move, the motion should be made here.

N. B. It was afterwards moved in Chancery, and the Chancellor said he did not look upon the verdict as complete, when the Judge on the trial had thought fit to give the counsel leave to move, and directed a further application to be made to this Court.

Blossett, Serj. accordingly moved it again, *Wednesday, November 19th, 1813*, when a rule *nisi* was granted.

(a) As to the general practice, see *Tidd*, 7th ed. 920.

SMITH against CUFF.

1816.

18th June.

THE Attorney-General moved to set aside a nonsuit, on payment of costs. The declaration was generally of the Term, and there was no special memorandum; and it appeared in evidence that the cause of action accrued after the first day of the Term, and the writ was not in Court to prove when the action was really commenced, and consequently the plaintiff was nonsuited.

Rule *Nisi* (afterwards made absolute) on payment of costs.

New trial granted on payment of costs, where plaintiff was nonsuited on the ground that there was no special memorandum, and the writ was not in Court to prove the commencement of the action, and the cause of action accrued after first day of Term.

SPRAGUE against MICHELL.

1816.

9th Nov.

LENS, Serj. moved for a new trial, the verdict having been for the defendant, in an action for running down a schooner. At the trial there was contradictory evidence, but the learned judge expressed to the jury a strong opinion that the weight of evidence was in favour of the plaintiff; but the verdict was given against that direction of the judge.

Contradiction of witnesses is not alone a sufficient ground for a new trial, although the judge directed the jury contrary to their finding.

LORD ELLENBOROUGH C. J. Where there is much contradictory evidence, the circumstance of the jury having come to a conclusion upon it different from the opinion of the judge, is not sufficient ground alone.

Rule refused.

GATES against RYAN.

1816.

3d May.

ABBOTT J., in delivering his opinion (in the above cause, in which a rule *nisi* to enter a nonsuit, unless leave be given at the trial, and can move only for a new trial. But if the judge refused leave at the trial, because he thought it would be unnecessary, he will put the party on the same footing as if the leave had been given at the trial.

Defendant cannot move to enter a nonsuit,

1816.

GATES
against
RYAN.

suit was granted) said, if you had not leave, you cannot in strictness move to enter a nonsuit, but can ask only for a new trial; but as I refused on the trial to give you leave, on the ground that I thought it unnecessary for you, you ought to be in the same condition as if I had given you leave; therefore your rule may be to enter a nonsuit.

1818.

13th Nov.

DOE dem. ROBERTS against ROBERTS.

When a bill of exceptions has been tendered, the Court will not grant a motion for a new trial, unless the bill of exceptions has been abandoned. *Semble*—a conveyance of land, in order to give a qualification to sport, is valid, and conveys a qualification.

THIS was an action of ejectment, in which a verdict had been obtained for the defendant, on the ground that the land for which the ejectment was brought had been conveyed as a qualification to shoot, and such conveyance was not considered effectual to pass the property. *Peake* now moved for a new trial; and observed, that the objection was admitted.

Puller objected to this application, that a bill of exceptions had been tendered at the trial.

PER CURIAM. You must make your election, either to abandon the bill of exceptions, or this motion. This motion cannot be granted unless the bill of exceptions is abandoned.

Peake decided to abandon the bill of exceptions and objected to the evidence adduced at the trial for the purpose of defeating the deed, and to the Judge's direction. The deed was good, he contended, between the parties, no fraud or deceit having been practised

BAYLEY J. intimated, that there was a case respecting a parliamentary qualification, in which *Lord Kenyon* expressed a very decided opinion that it would pass the property.

Tripp, amicus curiæ, said, he remembered that Lord *Kenyon* held that the property would be attachable, by the creditors.

PER CURIAM.

Rule Nisi.

1818.

DOE, dem.
ROBERTS
against
ROBERTS.

RANSTON *against* ETTERIDGE.

9th Nov.

THIS was an action against a postmaster for penalties, for neglecting to insert in his weekly account, kept for the information of the Stamp Office, in pursuance of the 48 *Geo. 3. c. 98. sec. 7.* the duties upon horses let for travelling. The cause was tried before *BAYLEY J.* at the Summer Assizes for *York*; and after a verdict found for the defendant, *Raine* moved to set aside that verdict, and have a new trial. He admitted the general rule, that where the defendant has obtained a verdict in a penal action a new trial will not be granted; but this case was attended with particular circumstances. The Judge thought that the case on the part of the plaintiff was clearly established. In *Jervoise q. t. v. Hall (b)* it was held, that a new trial could not be granted in a penal action for a misdirection of a Judge; but that authority was over-

After a verdict for the defendant in a penal action, the Court will not grant a new trial where the verdict was contrary to the judge's direction, and founded on a mistake, if there has been no misconduct in the jury (a).

(a) The Court will not in general grant a new trial in penal actions after a verdict for the defendant, except for a misdirection of the judge. *The King v. Mann*, 4 *M. and S.* 337. *Brooke v. Middleton*, 10 *East*, 268. *Stratton v. Rastall*, 4 *T. R.* 753. *Calcraft v. Gibbs*, 5 *T. R.* 19. In a late case in *C. P.* that Court granted a new trial after verdict for defendant, in an action on the statute of tithes, 2 and 3 *Edw. 6. c. 13.* considering that as a remedial act. *Lord Selsea v. Powell*, 6 *Taunt.* 297. In *quo warranto* informations, a new trial may be granted after a verdict for the defendant, when it is against the weight of evidence. *Rex v. Francis*, 2 *T. R.* 484. After acquittal on indictment for misdemeanor in not repairing a road, a new trial will not be granted. *The King v. Mann*, 4 *M. and S.* 337. But the Court has suspended the entry of judgment, upon terms, under particular circumstances, when manifest injustice would otherwise have been produced. *The King v. Handsworth*, 1 *Barn. and Ald.* 63.

(b) 1 *Wils. Rep.* 17.

RANSTON
against
ETTERIDGE

ruled in *Wilson v. Rastall* (c), which case seems also to break in upon *Tonnerreau v. Bennett* (d). Now, the conduct of the jury may be more outrageous and mischievous than the Judge's misdirection; and it is not laid down generally and exclusively, that a new trial will be granted in no case except for a misdirection. The Court had never said that a new trial should not be granted for such an error as that of which the jury had been guilty. He was about to enter upon the facts, but

ABBOTT C. J. said, that there was a preliminary objection, which should be disposed of first. He referred to *Brook, q. t. v. Middleton* (e), and observed, that the doctrine held in that case had not been adopted without consideration. Without saying that the hands of the Court are in all cases tied down, I must say thus much, that the Court will not interfere without express proof of *misconduct* in the jury. Name such here. I think they were mistaken; but that is not sufficient. They were mistaken, because this was a matter of direction in revenue law, and the provisions of that law were intended, and have been always held, to exclude all questions of intention; that was their object. Perhaps the jury thought there was no intention of fraud; that was wrong, but was no misconduct. He was therefore of opinion that there ought not to be a new trial.

BAYLEY J. referred to *Rex v. the Inhabitants of Wandsworth* (f).

Rule refused.

(c) 4 Term. Rep. 753.

(d) 3 *Wilson*, 59.

(e) 10 *East*, 268. 1 *Campb.* 450, S. C.

(f) 1 *Barn.* and *Ald.* 63, *post*, 282.

BEAUMONT *against* FIELD.

9th Nov.

* **THIS** was an action of trespass for breaking and entering coal-mines : the defendant pleaded not guilty. *Hullock*, Serjeant, moved to set aside a verdict for the plaintiff, and enter a verdict for the defendant, or have a new trial, on the ground that the Judge had misdirected the jury, and that the jury had misconceived that direction (a).

BAYLEY J. asked if the Judge had given leave to move to enter a verdict.

Hullock, serjeant. No such leave was granted. There was a special finding, which I contend to be a virtual finding for the defendant. There was a question as to the extent of a grant by *Sir Thomas Blackett*, the ancestor of the plaintiff. The defendant claimed to be entitled to the mines in question, under a grant made by *Sir Thomas Blackett*, by deeds of lease and release, in which there was a latent ambiguity. These deeds recite an agreement for the sale of coals, made 23d of *December*, 1789, and then grant, release, and confirm to the parties under whom the defendant claims, and to their heirs, "all the coals in Cold Harbour farm, and all the lands and grounds then in the occupation of certain persons by name, viz. the widow *Kellett* and son, and their assigns and under tenants." There was a question as to the intent of the parties. The words of the deed were clear in themselves, but there was a latent ambiguity arising from the circumstance, that at the date of the deed there were no lands in the occupation of the widow *Kellett* and son. The obscurity was produced by the applica-

Where lands were granted in the occupation of a particular person who had been dead two years before the making of the grant, and the jury found that the intention was to grant certain lands, but the words were not sufficient to express that intention, the Court held the verdict right. When extrinsic evidence is admissible to explain a deed.

(a) See the last case.

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tion of extrinsic facts. If there had been any lands upon which the words could have operated, they must have been applied, but there were no such lands. The only question for the Court at the trial was, what was the intention of the parties when the words were adopted. It was said on the other side, that these words applied to lands *once* in the occupation of a person of the name of *Kellett*. There was much confusion as to that name. There were lands in possession of persons of the name of *Kellett* for as many as fifty years. These different persons were no relations. There were two widow *Kelletts*, who had been in possession of lands. The words of the deed were "now in the occupation," &c. and not late in the occupation; and the grant was to the widow and "son," not sons. The widow *Kellett* died in the occupation of the land before the deed was executed. The plaintiff claimed the coals under the land in the occupation of the other widow *Kellett*; the defendant claimed coals under the lands in the occupation of both the widows *Kellett*. In this Court, as well as in the Court of Chancery, the intention is the only question. A person named *James Kellett* was in possession at the time of the deed being executed, at which time his mother had been dead for two years. He had lived with his mother during her lifetime, but she had the management of the estate. *Beaumont v. Fell* (a). This case was in Chancery; but that circumstance makes no difference. In the case of a will the circumstances are gone into. Lord *Cholmondeley v. Lord Clinton* (b); and Sir *W. Grant's* luminous judgment in that case. Lord *Walpole v. Lord Cholmondeley* (c). *Doe v. Orenden* (d). If the jury could not apply these words according to the intention, then the deed was void for uncertainty. The Judge directed the jury that "the question for their consideration was, what

(a) 2 *Peerc Wms.* 141.

(b) 2 *Merivale*, 344.

(c) 7 *Term Rep.* 148.

(d) 3 *Taunt.* 147.

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the parties intended to pass by the words." In a Court of Law we construe the words strictly; in a Court of Equity mistakes may be rectified. Proof of a different intention in the parties would not authorize the jury to alter the deed. Those are not principles to be applied to this case. The jury took some time in considering their verdict, which was given for the plaintiff, on the ground that the intentions of the grantor and grantee were not sufficiently expressed in the deed of 1790. The jury requested that that finding might be entered on the *postea*. *Hullock* contended that the effect of that finding was, that the words were insensible. Even if the rule could not be granted in its full extent, at least the case was fit for further consideration. The finding was not complete, and was, in fact, no finding on the point in issue. The evidence is not proposed to be entered into now. The question is, whether the finding was sufficiently conclusive. There is a distinction between cases where there is something to which the words can apply, and the question is only as to the extent, and those cases where there is no subject matter to which the words can apply. The verdict finds an intention in fact more extensive than the words of the deed; but in fact the words of the deed apply to nothing: without parol evidence there is nothing to which it can apply. This is not a question as to the evidence on the general finding, but whether the finding is sufficient.

ABBOTT C. J. I am decidedly of opinion, that the direction and finding are both consistent with principle. If the widow *Kellett* had been alive at the time of the deed there would have been no doubt; but in fact she was dead two years before. Then the question is, not abstractedly what was the meaning of the grantor, but what was his meaning by the words used; and they meant only lands which had been in the occupation of widow *Kellett*; and the jury find, that

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though the intention was to grant all the lands, yet the words are not sufficient to express that intention.

BAYLEY J. I am of the same opinion, and assent to the reasons. The intention is not to be sought generally, *dehors* the deed and *dehors* the evidence, but subject to the deed and evidence. The jury ought to find what was meant by the words "lands in the possession of widow *Kellett* and son."

HOLROYD J. I am of the same opinion. The intention of the party must be taken by the jury from the import of the words which have been used; and I think the jury correct in the conclusion they have drawn.

Rule refused.

1818.

20th Nov.

THE KING *against* BOWDITCH *and others.*

Affidavits of fresh facts are not in general admissible in criminal cases, on a motion for a new trial, unless there was some surprise on the defendant at the trial; affidavits of the death of a person may be received to account for his not being examined (a).

THIS was an indictment against the defendants for a conspiracy, and was tried before PARK J., at the Summer Assizes at *Dorchester*, when all the defendants, except one of the name of *Elizabeth Snell*, were found guilty. *Scarlett* now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted.

ABBOTT C. J. inquired if the defendants were in Court? and it appeared that they were present.

Scarlett then proceeded. The indictment was for a

(a) The Court will not in general grant a new trial, in order to let the party into a defence, of which he was apprized at the first trial. *Vernon v. Hankey*, 2 T. R. 113. 2 Salk. 647. 653; nor on account of the omission of the defendant or his attorney, in not coming prepared with evidence which might have been produced; *Bul. Ni. Pri.* 327; *Walker v. Scott*; or because one of the witnesses made a mistake in giving his evidence. *Sayer*, Rep. 27; or was discovered to be incompetent, after the finding of the jury. 1 T. R. 717. *Chit. Crim. Law*, 656. It seems, too, that the mere ground of a witness having given evidence contrary to what was expected, is not sufficient to authorize a new trial. *Hewlett v. Crutchley*, 5 Taunt. 277.

conspiracy to abduct Miss *Glenn* clandestinely, without the consent of her mother, or Mr. *Tucker*, who had married her aunt, and at whose house the young lady lived. There was also a count for an assault and false imprisonment. The motion was made on two grounds; namely, first, the verdict was against evidence; and secondly, there were affidavits to contradict the facts proved in support of the prosecution, most of which were a surprise at the trial on the counsel for the defendants. In some of the facts all parties are agreed; but others are disputed. On the 2d of *July* Miss *Glenn* went to the farm of *Bowditch*, the defendant; on the 2d of *September* she returned to Mr. *Tucker's*, and remained there till the 26th of *September*. It was *Sunday* when she departed. She stayed on *Monday* and *Monday* night at Mr. *Bowditch's* farm, and was taken back by Mr. *Lee*, solicitor of Mr. *Tucker*, on *Tuesday* morning. The indictment simply charged a conspiracy; force was only alleged in the last count, for false imprisonment, and there was no averment in the first count that the parties knew that Miss *Glen* was a minor. According to one of the witnesses, Miss *Glenn* came to *Bowditch's* farm, and from thence to the farm of Mr. *Paul*, one of the defendants, at *Thornford*, from which place she was removed by Mr. *Lee* on the next day. Mr. *Lee* was not called as a witness, and therefore, whether the young lady came away from thence voluntarily or not, was not proved. [ABBOTT C. J. here observed, upon a part of the fresh evidence proposed to be brought forward, that affidavits as to the handwriting of the young lady could not be received, inasmuch as with respect to them the defendants could not be taken by surprise, for she had denied one of the letters to Mr. *Oxenham* the attorney. The rule was strict, and could not be departed from, unless a very strong case was made out.] It was then insisted, that affidavits

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had been often admitted by inspectors of franks, &c. in order to prove that a particular handwriting is not feigned, as well as with respect to the identity of handwriting. Admitting that the evidence was not proper for a jury, it was said to be a different question, whether it is fit for the Court on motion. Affidavits of defendants themselves are often taken, on these summary applications. [ABBOTT C. J. How can the Court look at affidavits which could not be submitted to the jury? The affidavits of defendants may perhaps be taken in the progress of a cause on motions, particularly in criminal cases, in order to remove an implication that the parties accused could not deny on oath the offences with which they are charged.] It was contended, however, that there was a surprise on the defendants. *Oxenham*, the attorney for the defendants, denied facts stated by Miss *Glenn*, and which could not have been anticipated. Some of the facts were known only to a clergyman who had died. It was then mentioned on the part of the defendants, that they were possessed of an affidavit of instructions, given by this clergyman previously to his death, for preparing an affidavit, and that these instructions were material to the point in question.

PER CURIAM. The affidavit proposed cannot be received. There may be affidavits of the clergyman's death, to account for his not being examined.

Scarlett then took an objection to the venue; and *BAYLEY J.* asked whether, without evidence of the assent of Mr. and Mrs. *Paul*, two of the conspirators(a) at *Thornford* in *Dorset*, there was evidence of any fact committed in *Dorsetshire*? He was answered in the negative; and it was urged that the venue must be laid where the conspiracy was commenced, and

(a) A *nolle prosequi* was entered as to these two defendants.

that there was no evidence that Mr. and Mrs. *Paul* knew of any thing before the arrival of the parties. He cited 1 *Salkeld*. 174. as deciding that the venue must be laid in the county where the combination took place, and not where the object was carried into execution.

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ABBOTT C. J. however said, that at present the Court did not see any reason to graⁿt the rule upon the point as to the venue. But, nevertheless, as the case was important to public justice; and it was fit that justice should be administered with great caution, therefore a rule *nisi* would be granted, in order that the matter might be settled.

Scarlett then suggested, that husband and wife could not be indicted together for a conspiracy; but BAYLEY J. intimated, that that rule was confined to felony; and ABBOTT C. J. said, that with others they might be indicted. Husband and wife cannot be indicted alone for a conspiracy, because they constitute but one person (*b*); but there are many instances of their being indicted in conjunction with other persons. That point, however, is not necessary to be discussed at present. As there are many defendants, an arrangement had better be made for the case to stand over till next Term.

The Court granted a rule *nisi*, which was discharged in the following Term on cause being shewn, and sentence was passed upon the defendants. *Pell*, Serjeant, *Gaselee*, *A. Moore*, and *Williams* for the prosecution; *Scarlett*, *Casberd*, *Selwyn*, and *Jeremy* for the defendants: but, afterwards, one of the witnesses for the prosecution was convicted of perjury, and it was satisfactorily established that the defendants were not guilty of the offences imputed to them.

1817.

26th April

Though the Court will not grant a new trial on an indictment, where the verdict was given for the defendant, yet it will stay the entry of judgment on a former verdict, to prevent the plea of *autre fois acquit* on a fresh trial.

REX against INHABITANTS of WANDSWORTH.

GURNEY moved for a new trial on the part of the plaintiff, where the verdict had been given for the defendants. He stated, that it had been given against evidence; and if not against the direction of the judge, it was nevertheless against his strong intimation. The question on the trial was, whether a highway was a private or public one. The verdict found, that it was not a public highway.

LORD ELLENBOROUGH C. J. The rule is, that you cannot have a rule for a new trial where the verdict has been given for the defendant; but we can give you the effect of a new trial, by giving you a rule in another shape, to stay the entry of judgment on the verdict given till the event of a fresh trial, which will prevent the former verdict from being pleaded on *autre fois acquit*.

Rule *nisi* granted in that shape.

NON PROS.

BROOK *against* **LAWRENCE.**

1820.

1st Feb.

IN this case, the action was commenced in *Hilary* Term last; the plaintiff declared as of *Easter* Term; and in the same Term, the defendant pleaded. The plaintiff took out several summonses for time to reply. The last order for time expired towards the close of *Trinity* Term; and repeated applications having ineffectually been made by the defendant for his replication, the defendant, at the end of *Michaelmas* Term, signed judgment of *non pros.* as of that Term, without taking out any rule of that Term to warrant the judgment.

Comyn, on a former day, obtained a rule to shew cause why the judgment of *non pros.* should not be set aside for irregularity, on the ground that no rule to reply was given as of the Term in which the judgment was signed.

Wilde now shewed cause; and admitting that in general there must be a rule to reply, of the Term in which the judgment of *non pros.* is signed, yet he contended, that the plaintiff's delay in this case, and having had repeated requisitions served upon him to reply, took the case out of the operation of the rule referred to.

Before the defendant can sign judgment of *non pros.* he must take out a rule to reply, as of the Term in which the judgment is signed; but where, after repeated applications made to him for the replication without effect, and after orders obtained for time to reply, the defendant signed judgment of *non pros.* without taking out a rule to reply as of the Term in which judgment was signed, the Court refused to set aside the proceedings, otherwise than on the Terms of the costs being costs in the cause.

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BAYLEY J. (a) thought, that the practice of the Court ought to have been complied with in strictness; but, advertng to the delay imputed to the plaintiff, it seemed reasonable to set aside the judgment, ordering the costs of this motion to be costs in the cause.

Rule absolute.

(a) The only judge in Court.

ORDER OF SESSION.

1818.

15th April.

REX against GUILDFORD.

The binding an apprentice to a *feme covert* is void. Where only one question is submitted to the Court of K. B. by the Sessions, the Court will not consider any other questions.

BARROW stated that the sessions had confirmed an order, and that the question was, whether the binding of a person as an apprentice to a *feme covert* is good.

LORD ELLENBOROUGH C. J. Is it a binding at all?

ABBOTT J. Who is bound to instruct the apprentice?

LORD ELLENBOROUGH C. J. There cannot be a binding *in vacuo*.

Nolan contended there was another point.

LORD ELLENBOROUGH C. J. There is only one question in the case upon which our opinion is asked.

Nolan. The Court should look to the order, and see any objections on the face of the order; and if brought

here by *certiorari*, any objections on the face of it would be fatal, and the Court could not enforce it.

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against
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LORD ELLENBOROUGH C. J. We are not called upon to enforce it, that is not our duty; we have nothing to do with it. For many years, as a matter of courtesy, we have answered questions asked of us by the sessions. But if they ask us one question, as they have here, we cannot answer two. If they asked us no question we might have looked to the order; but as they have asked us *one*, we will not go farther.

Nolan. As to the first point, cited *Cowp.* 201. *Com.* Dig. tit. Baron and Feme.

BAYLEY J. That is because the first delivery was void. If you will look into *Perkins* you will find, if the first delivery is good, that a second is void.

Nolan. Will the Court send back the case to be re-stated?

BAYLEY J. There has been expence enough already.

Rule discharged.

OVERSEERS.

1814.

1st July.

A commitment under 50 *Geo.* 3. c. 49. s. 1. of the late overseers, for not delivering up the parish-books, should specify what the books are.

GROVER against FORRESTER.

LORD ELLENBOROUGH C. J. in delivering judgment, stated that this was an action of trespass for false imprisonment against the defendant, who was a magistrate, and who had committed the plaintiff under the statute 50 *Geo.* 3. c. 49, for not delivering up, when he had ceased to be the overseer of the parish, the bastardy-book, and other books of the parish. The commitment was general till he delivered up all the parish books, without specifying what books. This was clearly bad, for it left the gaoler to be the judge of what were the parish books. The commitment should have specified by name what books he was to give up. Therefore, upon the authorities of 2 *Inst.* 591. *Carth.* 152. 43 *Eliz.* c. 2. *Bracy's case*, 1 *Salk.* 348,

Rule nisi for new trial discharged.

N. B. The Court expressed a strong wish to relieve the magistrate if they could, as it appeared to be merely a mistake, and not an intentional injury; but the commitment was held clearly illegal.

1816.

26th Nov.

REX against TUCKER Overseer of the Parish of
Harbut, Devonshire.

Overseer who has been committed for not delivering his account, and paying over the balance due, may be discharged, if he have become bankrupt and obtained his certificate, although he became bankrupt before the expiration of the year for which he acted (a).

NOLAN shewed cause against a rule why the prisoner should not be discharged out of custody,

(a) See *Nolan's Poor Laws*, 3d ed. 354.

under a commitment for not giving in his account as overseer, and paying over the balance, he having become a bankrupt and obtained his certificate. He cited *Rex v. Egginton*, 1 T. R. 369. *Ex parte Exleigh*, 6 Ves. 811; and stated, that the defendant was committed till he had delivered in his accounts and paid the balance. The question was, whether he was discharged by his certificate as a bankrupt. He was committed 6 Feb. 1816, and the new overseers were appointed on Lady-day 1816. He contended that the debt could not have been proved under the commission. *Rex v. Egginton*, was disapproved of before the Chancellor, in a subsequent case. An overseer is not the same as a trustee. *Foley*, p. 23. An overseer is not compellable to give in his accounts till the end of the year. It is indictable not to pay over. 2 Str. 1268. The statute 17 Geo. 3. contains no provision as to bankrupts.

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 against
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BAYLEY J. Is not all the money in his hands payable *in præsentia*, though the year be not expired?

Nolan. Here is no one to claim the debt.

ABBOTT J. The fresh overseers might have claimed.

Gifford, *contra*, cited the case of the land-tax controller, that some one might prove for the rest of the parish.

Rule absolute, on verifying the accounts, and undertaking not to bring an action.

PARISH AND PARISHIONER.

1821.

11th Feb.

A parishioner has no right to inspect parish books, for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish, and therefore the Court refused a *mandamus* for that purpose.

THE KING *against* SMALLPIECE *and others.*

LITTLEDALE moved for a rule to shew cause why a *mandamus* should not issue, directed to the defendants, the churchwardens for the time being of a parish named in the affidavit, commanding them to permit a parishioner to inspect the parish books, touching the rateability of certain property in the year 1790, in respect of which he claimed as a grandson and remainderman under the will of his grandfather, the tenant for life having died in the year 1781. The object of the inspection was to ascertain who the churchwardens were at the period mentioned, for the purpose of producing the rates, with a view to support his claim to the estate in question. He contended that the parishioners of the parish had a right, in respect of their interest in the parish property, to inspect all parish books, rates, and assessments, from analogy to the right that a copyholder has to inspect the court rolls, and take copies of them, so far as they relate to his copyhold. In point of principle the two cases were the same; for a person who pays parish rates, stands in the same situation with respect to interest, as a copyholder. Undoubtedly a mere stranger, who does not pay parish rates, has no right to inspect the parish books; but any body who has an interest in the books, may have a right to inspect them, in like manner as a copyholder may inspect the court rolls. In the case of the *King v. Lucas* (a), it was holden, that one who has a *prima facie* title to a copyhold, is intitled to inspect the court rolls and take copies of

(a) 10 East, 235.

them, so far as relates to the copyhold claimed, though no cause be depending for it at the time; and there LORD ELLENBOROUGH C. J. said, "he did not know why there should be any cause depending, in order to found an application of this sort; this was not the impertinent intrusion of a stranger, but the application of one who was clearly intitled to the copyhold, unless there should be some conveyance of it by those under whom he claimed; he might therefore well require to see whether there appeared upon the rolls to be any such conveyance." So in this case the party was not a stranger, obtruding himself impertinently for the purpose of obtaining information which he had no right to receive. He also referred to *Rex v. Allgood* (a).

1821.

THE KING
against
SMALLPIECE
and others.

ABBOTT C. J. I see no analogy between the court rolls of a manor and the books of a parish; and I know of no rule of law which requires the parish officers to shew books, in order to gratify the curiosity of a private individual. If we were to grant this application, it would next be desired of us to grant a *mandamus* to require the owner of property to shew all his title deeds.

BAYLEY J. The court rolls of a manor are kept for the common purposes of letting in tenants, and every copyholder has an interest in the rolls; but the situation of a copyholder is very distinguishable from that of a parishioner, with respect to parish books. The case cited, of *Rex v. Lucas*, has no analogy to this. The party here does not want to look into the parish books for the purpose of knowing any thing upon the subject of rates, but his application is in effect like filing a bill in equity for a discovery.

HOLROYD J. concurred (b).

Rule refused.

(a) 7 T. R. 746.

(b) Best J. was absent.

1814.

29th June.

ANONYMOUS.

Rule for an inhabitant of a parish to inspect the parish books, may be absolute in the first instance.

THIS was an issue to try the custom as to a church rate. *Reynolds* moved for a rule, that the party might have liberty to inspect the parish book, he being stated in his affidavit to be an inhabitant of the parish, and interested in the question.

BAYLEY J. said he could only grant a rule nisi.

Reynolds. May it be to shew cause at chambers?

BAYLEY J. I cannot grant it so.

But after some observation by *Reader*,

BAYLEY J. said he thought they ought to have an inspection of the books, so far as applied to the question in dispute, and the

Rule was granted absolute in the first instance.

PLEADING.

EDMONDS *against* **WALTER** *and another.*

1820.

1st Feb.

DECLARATION against the defendants, as printer and publisher of the *Times* newspaper, for a libel of and concerning the plaintiff in his character of preparer of paragraphs for newspapers. The declaration contained two counts, which were in truth for the same libel; but the second count, as usual, complained of the publication of a certain other libel. The defendants pleaded special justifications, and in all their pleas stated that "the said supposed libels, in the said first and second counts stated, were one and the same supposed libel, and not other or different supposed libels." To these pleas there was a demurrer, assigning for cause, first, that by this mode of pleading the defendants had unduly attempted to confine the plaintiff to one cause of action; second, that although the plaintiff had complained in his declaration of two distinct publications of libellous matter, and the defendants had professed, in the introductory part of their second and subsequent pleas, to justify the whole of the causes of complaint, yet they had not in those pleas alleged or shewn that the publications of the said libel, in the said first and second counts mentioned, were one and the same publication. There was another cause of demurrer assigned, but it was not brought under the consideration of the Court, joinder in demurrer.

The declaration having in the first and second counts alleged "the composing and publishing of two libels," the defendant in his pleas of justification stated, "that the libels so set forth were one and the same supposed libel, and not other or different supposed libels;" Held on demurrer, that the pleas were bad on this ground.

Chitty, in support of the demurrer, was stopped by

THE COURT, who said that the pleas were decidedly

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bad; because it was not possible to say with truth that the two libels, alleged to have been severally composed and severally published, were one and the same libel. This objection applied to all the pleas. The pleas might be put in a different form, so as to obviate these objections. There was certainly great weight in the objection, that the pleas averred the two libels to be one and the same, and the pleas did not go on to say, that the act of publication was one and the same, which could not well be, if the libels were different. The defendants, however, might elect to amend if they chose, upon the usual terms.

Platt, for the defendants, said he would amend.

If a defendant obtains leave to amend his pleadings on payment of costs, it does not seem to be a necessary term, under the words *usual terms*, that he should be prepared to go to trial at the ensuing sittings after the then Term.

Chitty submitted, that the usual terms accompanying leave to amend, were those of paying costs, and amending forthwith; so that the plaintiff might go to trial at the adjourned sittings after this Term.

THE COURT, however, said, that what was meant by the usual terms was, amending upon payment of costs; and they would not impose upon the defendants the term of amending, so as to go to trial at the sittings after Term (a).

(a) *Vide Sheldon v. Clipshaw*, Sir T. Jones, 158, Sir T. Raym. 449. S. C. *Achinet v. Blades*, 1 Marsh. 17. 5 Taunt. 200. *Taylor v. Herbert*, Freemant, 367; *Albs v. Stafford*, Hil. T. 1817. *Andrews v. Button*, Oct. 1819, at *Serjeant's Inn*.

1820.

12th Feb.

HILL against DYBALL.

After the defendant had obtained an order for staying proceedings upon paying the debt and the costs, which had been taxed, and having afterwards abandoned the order, he pleaded a judgment recovered, the Court held, that the plaintiff was at liberty to sign judgment, the plea filed being a fraud upon the judge's order.

THIS was a rule calling on the plaintiff to shew cause why the judgment signed should not be

set aside for irregularity, with costs. The facts were these:—The action was brought to recover the sum of 11l. 2s. and before the return of the writ, the defendant took out a summons before a Judge at chambers, calling on the plaintiff to shew cause why, upon payment of the debt and costs, the proceedings should not be stayed. The Judge accordingly made an order to that effect, and the plaintiff's costs were taxed; but neither the debt nor the costs were paid by the defendant. In consequence of this, the plaintiff delivered a declaration with notice to plead in eight days. Before the time was out, the defendant took out a summons before another Judge, for further time to plead; and the plaintiff having demanded a plea, the defendant filed a plea of *judgment recovered*; upon which the plaintiff signed judgment, and the question was, whether the judgment so signed, was regular.

1820.

HILL
against
DYBALL.

Abraham now shewed cause, and contended, that after the defendant had obtained an order for staying the proceedings upon payment of the debt and costs, (which had been taxed by the Master) he must be held to have admitted the debt, and was not at liberty to file a plea of *judgment recovered*.

Comyn, in support of the rule, contended, that as the plaintiff had not acted upon the rule, which had been abandoned by the defendant; but, on the contrary, had delivered the declaration and demanded a plea, which the defendant had filed within time; the latter was precisely in the same situation as if no order had been made in the cause by the Judge at chambers; and there was no case in which it was established, that where there is a plea of *judgment recovered*, the plaintiff is at liberty to sign judgment.

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ABBOTT C. J. I am of opinion, that this rule must be discharged with costs. After the Judge's order was obtained by the defendant for staying the proceedings upon payment of the debt and costs, it appears to me to be questionable, whether the defendant ought to have been allowed to plead any thing, because a plea of any sort would be in fraud of the order; but the plea of judgment recovered, after such an order was pronounced, was highly improper, because it is manifestly false. The plea of the general issue is one under which the merits of the question might be tried between the parties; but a person who puts a plea of judgment recovered on the files of the Court, under circumstances like these, is extremely censurable. If a Judge's order is to be followed by these consequences, there is no saying where the mischief will stop; and it is to be hoped that this practice will not be repeated.

BAYLEY J. It is obvious in this case, that the defendant obtained the order for staying the proceedings on payment of the debt and costs, merely for the purpose of gaining time, and delaying the plaintiff. It was highly improper for the defendant to plead a judgment recovered after the Judge had made an order for paying the debt and costs. No instance can be mentioned in which a defendant has been allowed to plead a judgment recovered, after such an order has been made, and the costs taxed. Indeed, the practice now is, to make it part of the terms of the order for staying the proceedings, that if the defendant does not pay the money within a given time, the plaintiff shall be allowed to sign judgment.

HOLROYD J. concurred (a).

Rule discharged, with costs.

(a) *Best J.* was absent.

Abraham then mentioned, that notice had been given in the cause for executing a writ of inquiry to-day; but owing to the lateness of the hour, it would be impossible to execute it to-day. He therefore prayed, that the plaintiff might have judgment as of this Term, upon giving a fresh notice of inquiry for a subsequent day, which became necessary in consequence of the delay occasioned by the defendant.

1820.

HILL
against
DYBALL.

Comyn said, he had no objection to consent to such an application.

ABBOTT C. J. I think the defendant acts very wisely in consenting, because the Court have been very much disposed to direct such a motion to be made against him, or his attorney, as might have been followed with some degree of severity.

FRY *against* CHAMPNEYS.

1820.

4th Feb.

ABRAHAM moved to set aside interlocutory judgment for irregularity, the alleged irregularity being, that the plaintiff had signed judgment after the defendant had filed a general demurrer.

A general demurrer must be delivered; filing will not do: and the plaintiff may sign judgment when it has been only filed.

THE COURT said, that the judgment was regularly signed, for that a general demurrer must be delivered, and not filed.

Rule refused.

KENT *against* MONK.

1820.

12th Feb.

**ABRAHAM* moved to set aside the interlocutory judgment signed in this case for irregularity, the alleged irregularity being, that there was a plea in the office before judgment was signed.

The plea of *plene administravit* must be delivered, and not filed.

1820.

KENT
against
MONK.

Comyn now shewed cause; and the only question was, whether the plea *plene administravit* was a plea to be delivered, or filed. The defendant had filed that plea, and the plaintiff had signed judgment.

HOLROYD J. (a) said, that the plea of *plene administravit* was one of those pleas which ought to be delivered to the attorney, and not filed.

Rule discharged.

1822.

(a) The only judge in Court.

29th Jan.

CUFF against COSTER.

Replevin plea in bar, "that long before the said time, when, &c. to wit, on, &c. defendant demised the *locus in quo* to plaintiff;" and replication "that long before the said time, when, &c. to wit, on, &c. at, &c. defendant did not demise *modo et forma*;" on demurrer, that the replication contained an immaterial traverse and negative pregnant; held, that the words "before the said time, &c." were the material part of the traverse; and proof of a demise at any time before the distress would maintain the action; and that the day and place subsequently mentioned, were immaterial (b), and that consequently the replication was sufficient.

REPLEVIN plea in bar, that "long before the said time when, &c. to wit, on, &c. defendant demised the *locus quo* to plaintiff." Replication "that long before the said time when, &c. to wit, on, &c. at, &c. defendant did not demise *modo et forma*." Demurrer that the replication was a negative pregnant, and made the day and place of the demise, which were immaterial, part of the issue.

Wightman, in support of the demurrer, contended, that this was a negative pregnant, and referred to *Ben-nett v. Holbeck* (a) as a direct authority.

SED PER CURIAM. The words "before the said time when, &c." are the material part of the traverse; and proof of a demise at any time before the distress will maintain the plaintiff's case, and the day and place subsequently mentioned are perfectly immaterial. In the case in *Saunders*, the traverse is "that the defendant did not on, &c. at, &c. demise," which is very different from the traverse in this case.

Judgment, that replication and traverse were sufficient.

(a) 2 *Saund.* 319. See Serjt. *Williams's* notes on this case.

(b) As to immaterial traverses, see 1 *Chitty* on Pleading, 602, 3.

WILLIS *against* WARD.

1818.

9th Nov.

THIS was an action for a disturbance of the plaintiff's right of common, and was tried before BAYLEY J. at the Summer Assizes at *Durham*. *Topping* now moved to set aside a verdict for the plaintiff, and (with leave) to enter a nonsuit. The declaration stated a right in the plaintiff to common for all his cattle *levant* and *couchant*; but according to the evidence, the common was insufficient for the support of all the cattle, and therefore the right could not possibly exist in the manner in which it was alleged. The allegation should therefore have been made with more limitation, and should have corresponded with the title which the plaintiff proved.

The allegation of a right of common for all the party's cattle, *levant* and *couchant*, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time (a).

ABBOTT C. J. The statement in the declaration appears to correspond with the fact. Nature, it seems, has set a limit to the exercise of the right of common; but the party was entitled to put all his cattle *levant* and *couchant* on the common, although, from the limited extent of it, he would not be able to keep them there long with benefit.

PER CURIAM.

Rule refused.

(a) The claim of a right of common of pasture for all the plaintiff's cattle, *levant* and *couchant*, on his land, is supported by evidence, that the plaintiff was part owner with the defendant and others of a common field, upon which, after the corn was reaped and the field cleared, the custom was for the different occupiers to turn out their cattle in common; the number turned on being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon the land during the winter; and although the custom proved was to turn out in proportion to the extent, and not to the produce of the land, in respect of which the right was claimed. *Cheesman v. Hardham*, 1 B. and A. 706. The law relating to a right of common of this nature is very ably explained in Mr. Serj. Williams's notes, 1 Saund. 28, and 28 (a).

1816.

1st May.

The plaintiff may suggest breaches in an action on a bond (8 and 9 *Wm. 3. c. 11. s. 8.*) at the conclusion of his replication (a).

HOMPHREY *against* RIGBY.

PEAKE moved in arrest of judgment, or for a pleader. He contended that the breaches were not properly suggested according to the statute 8 & 9 *W. 3. c. 11. s. 8.* The action was upon a bond. Defendant, after craving oyer of the bond and the condition, which was for the payment of different sums on different days, pleaded 1st, *Non est factum*; 2d, Fraud and *covin*; 3d, same generally. The plaintiff replied; and 1st, Joined issued; 2d and 3d, denied the fraud and *covin*, and took issue thereon, and then proceeded thus: "and hereupon for assigning a breach of the said condition, according to the statute, the said plaintiff suggests, and gives the Court here to be informed that, &c. (shewing the breach, and then suggested another breach thus:) "and for assigning a further breach," &c. The verdict was given for the plaintiff. He then read the statute 8 & 9 *W. 3. c. 11. sec. 8.* and said that there were only three cases in which the breaches may be assigned, viz. in judgment by *nil decit*; 2d, Confession; 3d, Demurrer. And they should be assigned either in the declaration or in the replication; here they were suggested at the end of the replication: and he cited *Etherson v. Jackson*, 8 T. R. 255; *Delarue v. Stewart*, 2 New Rep. 362; *Plomer v. Ross*, 5 Taunt. 386; 1 *Marsh.* 95. It was recommended by Mr. Serjeant *Williams* to be assigned in the declaration. But the statute had lain dormant for a century.

LORD ELLENBOROUGH C. J. What was the first case in which it was held compulsory to proceed according to the act?

(a) N. B. It is now considered better not to assign the breaches in the declaration; and that it is preferable to assign them in the replication.

Peake. Drage v. Brand, 2 Wils. 377, and *Hardy v. Rosewell*, 5 T. R. 638, 636, in this Court.

1816.

HOMPHREY
against
RIGBY.

HOLROYD J. Mr. Serjeant *Williams* recommended the course of assigning it in the declaration ; but suggested a difficulty where the plea was *non est factum* ; however, in *Everson v. Stewart*, it was held that it might be done even upon *non est factum*.

BAYLEY J. *Plumer v. Ross* is not contradictory to *Etherson v. Jackson*.

Peake. The defendant has by this proceeding had no opportunity of pleading to the suggestion.

PER CURIAM. Nor has he ever an opportunity of so pleading, in any case where there is a suggestion.

LORD ELLENBOROUGH C. J. thought it might be done as in this case.

Rule refused.

GABELL *against* **SHAW.**

1822.

12th Feb.

THIS was a rule calling on the plaintiff to shew cause why it should not be referred to the Master, to strike out two unnecessary counts in the plaintiff's declaration, which contained the *indebitatus* and *quantum meruit* counts, for work and labour performed by the plaintiff as an attorney, and two counts for work and labour generally, with the usual money counts.

Chitty shewed cause against the rule, and said that as the counts in question might be for separate and distinct demands ; viz. for professional business, and for other labour, the Court would not try upon affi-

Where a declaration contained, besides the usual money counts, the *indebitatus* and *quantum meruit* counts for work and labour as an attorney, and two similar counts for work and labour generally, the Court referred it to the Master to strike out the latter for superfluity, before the issue was made up.

1822.

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against
SHAW.

davit whether they were superfluous or unnecessary. At this stage of the action it was premature, at all events, to refer it to the Master to strike out the counts, supposing them to be superfluous.

Platt, contra, referred to *Boreness v. Wilcock* (a), and *Tidd*, 6th ed. 467. as direct authorities.

THE COURT said that the authorities cited were sufficient to warrant the reference to the Master, and therefore made the

Rule absolute (b).

(a) *Barnes*, 860.

(b) See 1 *Chitty's* Rep. 448; and *Bayley v. Watkins*, *ib.* 450, and cases there cited.

1817.

4th Feb.

GILES against BOUNE.

It is not necessary to set out the date of a bill; its delivery is its date; and it is a sufficient averment of nonpayment of a bill accepted, payable at *A. B.'s*, to state that it was presented at their house, without shewing it was to him.

MARRYAT, in support of demurrer. This was an action on a bill of exchange; but the declaration did not state any date to the bill.

LORD ELLENBOROUGH C. J. Then if there's no date, it operates from the delivery. The date in fact means the delivery, but is generally not left to parol evidence, but is stated on the face of it; but still this is only the delivery.

Marryat admitted that it was so in the case of deeds.

LORD ELLENBOROUGH C. J. And the rule is the same as to bills, as may be collected from the case of *Hague v. French*, 3 *Bos. & Pul.* 173.

Marryat. The second point is, that the bill being made payable at Messrs. *A.* and *B.* at a particular

place, the averment only stated that it was presented there and not paid; it was not said that it was presented to *A.* and *B.*, and that it was not paid by the defendant, or any person or persons on his behalf.

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GILES
against
BOUNE.

LORD ELLENBOROUGH C. J. It was not to be paid by *A.* and *B.*, but only payable there; and if it is paid by any other person, it is in fact paid by the defendant.

Judgment for plaintiff.

DEARE *against* EDMUNDS.

1817.

20th Nov.

LAWEES stated that this was an action for use and occupation; plea, distress for rent seized, taken, and retained; demurrer and joinder. He contended that the act of distress does not amount to satisfaction. The old form of plea was, that the money had been levied by distress, *Rastal*, 175. It is not here averred that distress was sold. If it was merely a pledge, the party might abandon it.

Plea of distress taken to action for use and occupation, no answer, unless stated how long retained, or that it was legally taken (a).

BAYLEY J. It is not even stated that the distress was legally taken, nor how long it was detained.

*

Platt, contra. The plea states that the distress was taken on the premises, and therefore liable to be taken, and *prima facie*, the distress was lawful; and after taking the remedy by distress, the party cannot harrass his tenant by an action for the rent. See also *Vasper v. Eddows*, 1 Salk. 248. *Burr. Rep.* 1738. *Robinson v. Clayton*, Cro. Car.

PER CURIAM. The law is not so, for they might

(a) The same point was decided in *Lees v. Wright*, Trinity Term, 1822, in K. B.

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DEARE
against
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be liable to be taken off the premises, as by *elegit* or extent.

ABBOTT J. The mere statement of the taking of a distress, without saying how long the same was detained, is not a satisfaction.

BAYLEY J. You should have shewn all the facts, which must be within your knowledge, and you must know what became of the distress ; and all facts which you must know, and do not shew, must be taken against you.

LORD ELLENBOROUGH C. J. It must be either a satisfaction or an injury ; if the first, you might so have shewn it ; and if the second, it may be the subject of another action.

Judgment for plaintiff.

1822.

12th Feb.

DOE *on dem.* of BEAUMONT against ARMITAGE.

Plaintiff in ejectment permitted to amend his declaration on payment of costs, by adding a new count on another demise, after three terms had elapsed, and the roll had been made up and carried in.

IN this case a rule had been obtained, calling on the defendant to shew cause why the lessor of the plaintiff should not be at liberty to amend the declaration by adding a count, introducing another demise. A receiver had been appointed by the Court of Chancery for the estate in question ; the lessor of the plaintiff was desirous of laying a demise in the name of the receiver, which he was advised was expedient. The declaration was entitled and delivered of *Hilary* Term, 1820,

Chitty shewed cause against the rule, and contended, that after the roll had been made up and carried in, and so many Terms had expired, it was now too late to amend. The roll had been completed, and the Court would not suffer its records to be defaced by

adding new counts. He referred to *Tidd*, 7th ed. 740. and *Barnes*, 6 & 8.

THE COURT, however, said that by the present practice of the Court, this might be done upon payment of costs; and therefore the rule was made absolute.

Rule absolute (a).

(a) *Vide Minchin v. Cope*, gent. 1 *Chit. Rep.* 45. *Woodruffe v. Williams*, 6 *Taunt.* 19, and 1 *Marsh. Rep.* 419.

1822.

DOE *on dem.*
of BRAUMONT
against
ARMITAGE.

HOPKINSON *against* TAHOURDIN *and another.*

1816.

26th Nov.

THE action was in *assumpsit*, on several promises. Defendants pleaded that the plaintiff accepted a pipe of wine in satisfaction of the cause of action. To this the plaintiff specially demurred.

Assumpsit on several promises. Plea to the whole declaration, that a pipe of wine was given in satisfaction of the cause of action, held bad on special demurrer (b).

BAYLEY J. held that the plea was clearly bad, and gave judgment for plaintiff, on the ground that a plea professing to answer the whole declaration, but being in truth only an answer to one of the causes of action therein complained of, was bad (b).

Guselee for plaintiff. *Chitty* for defendants.

(b) 1 *Saund.* 28, n. 1; 296, n. 1. *Willes*, 55.

TAYLOR *against* WATERS.

1816.

17th May.

IN this case, on a demurrer, the question was, whether it is a good replication to a plea of set-off, on a judgment, that the party against whom it was recovered was taken in execution upon it; and the Court gave

The taking a debtor in execution on a judgment, may be replied to a plea of set-off on such judgment.

Judgment for the plaintiff, on the ground that such taking in execution was a satisfaction of the judgment.

Lawes for plaintiff. *Taddy* for defendant.

1822.

1st Feb.

ELSEE *against* SMITH (*In Error*).

Falsely, maliciously, and without any probable cause, procuring the warrant of a justice to search the premises, and apprehend the person of A. on suspicion of felony, and thereby causing his premises to be searched, and his person imprisoned, is properly the subject of an action on the case, and not trespass.

A positive oath that a felony is actually committed, is not necessary to justify a magistrate in granting his warrant to search the premises, and apprehend the person of a party suspected of felony; and though it may be trespass in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who causes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause.

THIS was a writ of error from the Common Pleas. The declaration was in case. The first count alleged, "that the plaintiff in error went and appeared before a justice of the county of *Essex*, and falsely, maliciously, and without any probable cause, made a complaint on oath, that he had reason to suspect that several trees or parts of trees had been stolen from the King's Forest of *Hainault*, and that they were carried to the premises of *John Smith*, (defendant in error,) carpenter, of *Chigwell Row*, and were there concealed; and that he therefore prayed a search warrant to examine the premises of him the said *J. S.*; and that the plaintiff afterwards falsely, &c. caused and procured the said justice to make and grant his warrant in writing under his hand and seal, directed to the constable of *Chigwell*, and all other officers of the place, whereby, after reciting that the said *John Elsee* had made oath before the justice, that he the said *J. E.* had reason to suspect that a quantity of oak timber, the property of his Majesty, had been recently stolen from the King's Forest of *Hainault*, and that the said timber had been carried to, and was concealed on or near the premises of the said *J. S.* the said justice required such constables to search the premises of the said *J. S.* and that they should bring the said timber, if so found, before him the said justice, together with the body of him the said *J. S.* to be dealt with according to law; and that by virtue and under colour of the said warrant, and under pretence of the execution thereof, the said defendant, together with one *J.*, a constable, proceeded to a certain place near to the premises of the said *J. S.* and then and there the said defendant falsely and maliciously, and without any reasonable cause, pointed out to the said constable certain pieces of

wood then and there lying, and being near to the said premises of the said plaintiff, to be oak timber suspected to be feloniously stolen from the said forest of *Hainault*; and the said defendant, under colour and pretence of said warrant, then and there caused and procured the said wood to be seized and taken, and kept for the space of twenty-four hours, without any reasonable or probable cause; and the said defendant, on the same day, wrongfully and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be arrested by his body and imprisoned, and kept for the space of twenty-four hours, and caused and procured him to be conveyed before the justice aforesaid, who having heard all the said defendant could say or allege touching and concerning the said supposed offence, adjudged and determined, that the said plaintiff was not guilty of the said supposed offence, and the said defendant had not further prosecuted, but had deserted and abandoned the said complaint, and the prosecution was wholly ended and determined." The second count was more general, alleging, "that the defendant, without any reasonable or probable cause whatsoever, charged the plaintiff with a certain offence, punishable by law; to wit, that several trees or parts of trees, severed from the ground, had been feloniously stolen, and that the said plaintiff was guilty of such felony; and upon such charge falsely, &c. caused him to be imprisoned for twenty-four hours." The defendant pleaded not guilty, and there was a general verdict and judgment for the plaintiff for 760*l.* 7*s.* damages and costs.

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Assignment of Errors. First, That it is alleged in the first count of the declaration, that by the information laid before the justice, the defendant only prayed a search warrant to examine the premises of

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the plaintiff, and therefore the defendant is not liable for the imprisonment of the plaintiff under the warrant of the justice; 2d, That the cause of action in the said first count mentioned, describes too generally the mode by which the defendant charged the plaintiff with the supposed offence; 3d, That the mode by which the plaintiff was discharged or acquitted is not stated in the said count, and no legal determination of the complaint against the plaintiff is stated or shewn; 4th, That the proper remedy is trespass, and not case, for the supposed causes of action mentioned in the declaration; 5th, That the complaint alleged in the declaration stated a mere suspicion of felony, and not a positive oath of an actual felony committed, and therefore the justice was not warranted in issuing the warrant in the said declaration mentioned; and if not, then trespass was the proper form of action, if any was sustainable against the defendant, &c.

Chitty argued for the plaintiff in error, and *Walford* for the defendant in error; but as the judgment of the Court stated the points fully, the arguments of counsel are not given.

ABBOTT C. J. I am of opinion that the judgment in this case ought to be affirmed. Looking to the whole declaration, the inducement, and the matters charged in the conclusion, it appears to me to be very manifest that the plaintiff does not seek damages for the taking of his goods, but he seeks damages for the injury done to his reputation, and the imprisonment of his person, and therefore I think the verdict was correctly taken: that disposes of the objection. As to the other, which is the material objection in this case, namely, that this should have been an action of trespass, and not of case; that is founded on the supposi-

tion that the warrant which the magistrate issued for searching the premises and apprehending the person of the plaintiff was illegal. Now if the warrant be not illegal and void in its form, and be founded on the matter laid before the justice, and as he as a justice of the peace had authority to grant such warrant, then the present action is proper in its form, for falsely and maliciously causing the magistrate to grant a warrant to do the act complained of. When the matter was laid before the justice, he might lawfully, and in the due exercise of his authority, grant the warrant prayed. What is the charge laid before him? That he "the said *John Elsee* had reason to suspect that several trees or parts of trees had been stolen from the King's Forest of *Hainault*, and that they were carried to the premises of *John Smith*, carpenter, of *Chigwell Row*, and were there concealed." It has been contended that this would not justify the magistrate in issuing the warrant, which was afterwards issued, because there is no perfect allegation that the offence had been committed, but is only put as matter of suspicion. It appears to me on the authorities cited, speaking generally of the subject matter, they do not contradict the opinion I have formed. I am of opinion, that upon a representation to a magistrate, that a person has reason to suspect that his property has been stolen, or is concealed in a certain place, the magistrate may lawfully issue his warrant to search the place, and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless he might have great reason to suspect a particular party; and the magistrate would be well warranted in granting his search warrant. Sup-

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pose the case of a horse, which has been lost by its owner, and it is found in the possession of another person; the owner in that case might not like to take upon himself to swear that the horse had been stolen, for it may have strayed; but when he finds his horse is concealed in the stable of another person, he may very naturally conclude that it must be stolen, from the circumstance of the concealment, and therefore he may very conscientiously swear that he suspects it to have been stolen. If under such circumstances the magistrate is not authorised in issuing his search warrant, it might happen in many cases that felonies would go undetected. Therefore it appears to me, that upon such information the justice has authority to issue his search warrant, and if it is wrongfully issued, the party who causes it to be issued must make reparation to the person injured. It being alleged in this declaration that the defendant falsely and maliciously made a charge against the plaintiff, and caused and procured a warrant to be issued, whereby the plaintiff is apprehended and unjustly imprisoned, it seems to me that the action is properly framed in case, and ought not to be trespass.

BAYLEY J. I am of the same opinion. If a party acts himself in apprehending another, he may be liable in trespass; but if he falsely and maliciously, and without any probable cause, puts the law in motion, that is properly the subject of an action on the case. With that all the authorities agree. The allegation in this case is no more than that the defendant did falsely and maliciously, and without probable cause, put the law in motion against the plaintiff. It is alleged that he made a complaint before the magistrate, in which he stated he had reason to suspect that several trees and parts of trees had been stolen from the King's forest, and concealed on the premises of the plaintiff;

and that he falsely and maliciously caused and procured the magistrate to issue this particular warrant, which warrant states that the goods were suspected to be carried to, and were concealed on or near the premises of the plaintiff. The warrant is so framed, in order to meet the possible case, that if the trees had been originally carried to the premises they would be removed to some place near them, so as to be convenient within the reach of the party who originally concealed them. Now if the defendant falsely and maliciously procured the warrant to be made out, he caused and procured it to be made out in the way alleged. There is no positive allegation that the property had been stolen, nor need there be any to justify the warrant; for I take it to be quite clear that it is not essential, in order to give the magistrate jurisdiction, that the party should take upon himself absolutely to swear that a felony is committed; but if he states that he has just cause to suspect a particular person, and upon that representation a warrant is improperly granted, that forms the foundation of an action in case, and it does not lie in the mouth of the party so acting, to say that the warrant is improperly granted. He makes the charge, and he prevails upon the justice to issue his warrant; and upon that warrant being issued, he has no right to say, "I am not liable for the consequences; because, true it is that I caused and procured the justice to issue his warrant, but the charge was not sufficient to authorize the justice to do what I required him." I think that affords him no ground of defence. I am of opinion also that there is nothing in the other objections. This is the case of a person maliciously, and without probable cause, putting the law into motion; and as that is the proper subject of an action on the case, I think there is no error on this record.

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HOLROYD J. I think there is no error in this case, and that the judgment ought to be affirmed. The action is for a malicious prosecution, in consequence of which a warrant issues. If the warrant issued without due authority on the part of the magistrate, that would be trespass in the magistrate; but it by no means follows that it is trespass in the party who, by laying the information before the magistrate, is the cause or instrument on which the magistrate acts in granting his warrant. He lays a statement before the magistrates, of suspicion of the goods being stolen, and that they were carried to the premises of the plaintiff, and there concealed, and he prays a search-warrant to examine the plaintiff's premises. He does not, from any thing that appears on the face of the declaration, pray this specific remedy by warrant for the apprehension of the plaintiff. Now if the declaration had stated that the defendant had gone before the magistrate and prayed for a search-warrant, on a specific charge of felony, then there might have been some colour for arguing that the declaration ought to have been in trespass. It is said that the granting the warrant is the act of the magistrate, and that if any action lies, it is trespass against him; and that the party who made the representation upon which the magistrate acted, is not liable. I think otherwise. The defendant is answerable in case, for falsely and maliciously, and without probable cause, making such a representation to the magistrate as induces him to grant his warrant. If the warrant was illegal, and the defendant himself went with the officer to execute it, that might make him a guilty trespasser; but it does not appear to me that there was any thing illegal in the warrant itself. There is nothing in this declaration which will make him a trespasser, although he was present when the warrant was executed. It is only that he caused and

procured the warrant to be executed, which would be the case, supposing he had by the means alleged caused and procured the warrant to be executed. On this ground, therefore, I think there is no error. I concur with the rest of the Court in thinking that there is nothing in the objection as to the mode in which the verdict was taken.

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BEST J. was of the same opinion.

Judgment affirmed.

BOURNE against DIGGLES and another.

1814.

9th Nov.

THIS was an action against an attorney, who had been employed by the plaintiff on his purchasing an annuity, for negligence, and on the trial a verdict was found for the plaintiff, on the third count of the declaration. *E. Lawes* now moved for a rule to shew cause why the judgment should not be arrested, or a new trial granted. The count on which the verdict was taken stated that the defendant had not looked into the title to the annuity; and this, it was contended, was a mere nonfeazance; and it was not stated that the defendant was to receive any reward or compensation for his service. *Elsee v. Gatward* (a) was cited. LORD ELLENBOROUGH C. J. inquired if it was not stated that the defendant was employed as an attorney; and on its being answered that the defendant was alleged to be retained, &c. but not as an attorney, his Lordship said that that must mean that he was retained as an attorney, and that the Court would take judicial notice that he will not act without reward; and [BAYLEY J. asked if there were not cases in which it has been held, if a man holds himself out as a member of a profession which implies skill, he is bound to

In an action against an attorney for nonfeazance, in not looking sufficiently into a title, it is sufficient to state that he was retained as attorney, without stating the consideration. If diligence would have been ineffectual, the defendant must prove it. If declaration state that the defendant was an attorney of a particular court, the plaintiff must prove it, though the defendant put in his plea as such.

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afford it, though his undertaking was gratuitous (a).] *Lawes* admitted, that if the objection was not sustainable upon the authority of *Elsee v. Gatward*, it must be abandoned. He observed that the distinction between persons professing public employments, and others, would be absurd, if the profession of attorneys was to be considered a public employment. The declaration does not alledge that the defendant accepted the plaintiff's retainer; but

LORD ELLENBOROUGH C. J. observed that the declaration alleged that the plaintiff retained the defendant; and that could not have been, unless the defendant had accepted the retainer. The very retainer was an employment, and could not be said to be without a consideration. The very retainer was taxable; and BAYLEY J. said, that there was no negligence in *Elsee v. Gatward*; the carpenter only agreed to do a thing in a certain time. The Court then overruled the objection.

E. Lawes then objected, that the count contained no allegation that diligence would have been effectual, and no negligence was alleged. But, *per*

LORD ELLENBOROUGH C. J. The jury must have found that there was negligence, to have found their verdict; and

BAYLEY J. said, if there was no negligence, or if no diligence would have been effectual, and you had proved either of those facts, the verdict would not have been as it now is.

E. Lawes then objected to the sufficiency of the

(a) See cases as cited in *Shields v. Blackburn*, 1 Hen. Bla. 161.

evidence adduced at the trial. The declaration stated that the defendant was an attorney of a particular Court, and evidence should have been adduced that he was such. The allegation in the declaration was, that he was an attorney of this Court. It was answered by the Attorney-General, that this was rendered sufficiently clear by the defendant's having appeared as an attorney ; but it was said that that was no answer, for it did not shew that he was an attorney at the time of the retainer. *Green v. Jackson (b)* was cited ; and in answer to a question from LE BLANC J. it was said, that there was no other evidence that the defendant was an attorney of this Court, except his appearing as such. The point was taken at the trial, but not much argued.

1814.

BOURNE
against
DIGGLES.

THE COURT, upon this point, were prepared to grant a rule *nisi* ; when LORD ELLENBOROUGH C. J., on referring to his notes, found that the defendant had given in the memorial in the character of attorney, and that he had delivered the plea as an attorney of the Court of King's Bench ; and therefore questioned whether the fact of his having been an attorney of that Court was not sufficiently proved.

LE BLANC J. intimated that he might have delivered the memorial as an attorney of the parties, and not an attorney at law.

DAMPIER J. He might have been an attorney of the Court of Common Pleas at the time when the memorial was delivered, and of the King's Bench when the plea was filed.

LORD ELLENBOROUGH C. J. He was an attorney when the memorial was delivered, and of the King's

Bench, when the plea was filed ; and it seems too much to suppose that he shifted in the mean time. However, the Court will grant the rule *nisi* for a new trial.

Rule *Nisi* granted for a new trial, but not in arrest of judgment.

1817.

14th May.

REX against DILLON and others.

An averment in an indictment for forcible entry, merely that the prosecutor was "seised," is sufficient to found an application for a writ of restitution, and it need not be shewn by prosecutor that he still continues seised.

THE defendants were brought up for judgment, on an indictment and conviction for a forcible entry ; and *Taunton*, for the prosecution, prayed a writ of restitution.

Jervis, Peake, and Chitty, for the defendants, objected, that the indictment stated only that the prosecutor was seised, not saying whether in his demesne as of fee, or as of freehold or otherwise ; and contended, that it was not sufficient.

BAYLEY J. thought it quite sufficient, for the term seised was to be taken as seised in fee.

HOLROYD J. was of the same opinion, and cited *Co. Litt.* 17. to shew that where it was stated "seised," it must be of an estate of freehold ; and 1 *Saund. n.* 8. 235. to shew, that if the plaintiff was seised only for a term which was expired, it should be shewn on the other side, with the exception only where the party was seised for the life of another ; in which case the party who avers such a seisin must shew that the other person's life was continuing.

ABBOTT J. (who had been counsel in the cause, did not interfere, till after the other two Judges had declared their opinions ; when he said), that he was of the same opinion ; and that if this averment was not sufficient, then it would be impossible to obtain

restitution on any indictment for a forcible entry, for it was impossible to aver in the indictment that the party would be alive, or his interest continue till restitution was prayed. If the interest be discontinued, it must be shewn by the other side.

1817.

REX
against
DILLON
and others.

If it is to be shewn by the other side, how is it to be done? By an affidavit, when the writ of restitution is prayed for, or by application to the Court, to quash the writ for restitution, or by giving indemnity to the sheriff, and to get him to return the special matter on the writ? Upon which the other party may either object to the return for insufficiency in law, or bring an action for a false return, if inaccurate in fact.

Writ of restitution granted.

HOWARD *against* PEETE.

1817.

23d Jan.

GURNEY moved to set aside a nonsuit. The action was in trespass, for running against and injuring plaintiff's cart; and plaintiff was nonsuited on a supposed variance in the declaration, which stated, that plaintiff was in the cart; whereas the evidence produced shewed that the plaintiff's servant, and not the plaintiff himself, was in the cart. *Gurney* admitted, that the nonsuit might have been right if such a variance as to the declaration and evidence had been "against a certain cart of the said *Joseph*, which he the said *plaintiff* was then driving."

Trespass for driving against plaintiff's cart : it is an immaterial allegation who was riding in it.

LORD ELLENBOROUGH C. J. It seems to me now to be quite an immaterial allegation, who was in the cart. There is some mistake; and if it turns out to be so, perhaps the rule had better be made absolute at once.

Rule *nisi*, and afterwards absolute.

MARSH, *Executor of WILLIAM QUINLAN, against*
BULTELL.

1822.

The first count of a declaration in covenant for not performing an award, by paying money awarded; second count, for revoking power of arbitrators. Plea to first count, a revocation by deed of the authority of the arbitrators before they made their award; held on demurrer, that this plea was a sufficient answer to the breach of covenant. The second count was on demurrer held sufficient, on the ground that an allegation that the defendant by deed revoked the arbitrator's power, imported an *effectual revocation*, and therefore imported that the arbitrators had notice of the revocation.

COVENANT on an arbitration deed. The first count stated defendant's covenant to abide by and perform the award of two arbitrators named in the indenture, or of those two and a third person to be nominated by them; and that defendant would not, by affected delay or otherwise, hinder or prevent the arbitrators from making their award; and that such award should be binding on both parties. It then stated the arbitrators' appointment of a third person, and that the time was duly enlarged, and that within such time the award was made, that the defendant should pay to the plaintiff the sums of ~~30~~1l. 16s. 7d., and 300/. costs; and that all disputes should cease. Breaches: First, that the defendant did not on request pay those sums; and second, that defendant prevented the arbitrators from making their award so soon as they would have done. Second count stated the covenant of reference, as in the first count, the appointment of the third arbitrator, and assigned as breach that the defendant, before the making of the award, hindered and prevented the arbitrators from making their award by executing a deed, whereby he did revoke, rescind, abrogate, recal, and absolutely put an end to the arbitration, and thereby hindered the arbitrators from making their award; and whereby the plaintiff was deprived of the benefit of the award. Plea to the first breach in the first count mentioned, that, before the arbitrators made their award, the defendant by deed revoked all authority in the arbitrators, to make their award; and, therefore, the award was invalid. And to second breach, that defendant did not hinder the arbitrators from making their award. To this plea the plaintiff

demurred. To the second count of the declaration the defendant demurred, assigning as causes of demurrer, first, that it is not alleged that the three arbitrators had any notice of the revocation; second, it is not shewn how the defendant hindered the arbitrators from making their award; and third, no notice of the appointment of the third arbitrator is alleged.

1822.

MARSH, *Executor of WILLIAM QUINLAN, against BULTELL.*

Chitty, in support of the demurrer to the plea to the first count, cited *Charnley v. Winstanley* (a); and in support of the second count, he relied on *Vynior's* case (b), as an express authority in point, to shew that an allegation that a party by deed revoked arbitrator's power is sufficient, without averring in express terms, that the arbitrator had notice of the revocation; and authorities to this point also, 1 *Brownl.* 62. 2 *Ibid.* 220. *Kidd* on Arbitrations, 214. *Bac. Ab.* tit. Arbitrament, B. G.; and *Fin. Ab.* tit. Arbitrament, D.; and the second objection also was answered by these authorities, it being unnecessary to shew more particularly in what manner the defendant hindered the arbitrators from making their award. Then the last objection, that no notice of the appointment is alleged, is without foundation; for in pleading it is neither usual nor necessary to insert that allegation. 2 *Saund.* 62. *Ibid. n.* 4 *Com. Dig.* tit. Pleader, C. 73.

Gaselee, contra, contended, that this case was distinguished from *Charnley v. Winstanley*, and that the mode of pleading the revocation in the second count was insufficient.

ABBOTT C. J. was of opinion, that the plea to the first count was sufficient. The ground of complaint in that count is the nonpayment of money pursuant to the award when made. It appears by the plea that

(a) 5 *East*, 266. (b) 8 *Coke's Rep.* 81, b.; and *vide* 4 *Rep.* 61, b.

1822.

MARSH, *Examiner*
of WILLIAM
QUINLAN,
against
BULTELL.

the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff, that although this plea is an answer to the cause of action suggested in this count, yet that inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count; and the case of *Charnley v. Winstanley* has been relied on. That case however is distinguishable from the present. There it appeared on the face of the plaintiff's count, that the award was made after one of the parties to the submission had become a *feme covert*. In this case the breach of covenant is only disclosed by the defendant's plea; and it never has been held that a plaintiff who seeks to recover damages for one ground of action stated in his count, is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion, that a plaintiff can recover only in respect of the ground of action stated in his declaration. As to the second count, this case must be governed by *Vynior's* case (c). There the allegation was, that the party by his deed revoked the authority to the arbitrator; and the decision was, that that allegation imported that the power to arbitrate had been effectually revoked, and that consequently notice had been given to the arbitrator; and that being so the case is expressly in point with the present. If the declaration in this case had alleged that the party had sealed and delivered a certain deed, containing therein as follows, and setting out the deed, and thereby revoked the authority of the arbitrators, it would not have been sufficient; for that would only have been an allegation of the effect of

the deed. Here the allegation is, that there was an express revocation by deed.

BAYLEY J. There is a great deal of difference between stating that a thing has been actually done; and giving the effect of the thing when done. In this case the party states that the defendant by deed revoked the authority of the arbitrator; and Lord Coke says, that nothing is revoked unless notice of it is communicated to the party interested. If that be so, then an averment that the defendant by deed revoked, contains a double allegation; one alleging that he executed a deed, which deed imported a revocation, and the other that notice of the deed was given to the party. There being in effect a double allegation, here the defendant is at liberty to put in issue the one or the other. One of the propositions is, that he executed the deed. He may say that he never did execute the deed; the other is, that notice is given, and he may deny that any notice was given. This case is not distinguishable from *Fynior's* case. I also think that the first count is sufficient.

1822.

MARSH, Esq.
Attorney of **WILLIAM**
QUINLAN,
against
HUTTELL.

HOLROYD J. was of the same opinion.

Judgment for defendant, on plea to first count,
 and for plaintiff on last count (*d*).

(*d*) *Best J.* was absent at chambers.

GRANT and others, against ———.

1815.

13th Feb.

TOPPING shewed cause against a rule obtained by *Marryat* to set aside judgment; and a question arose as to counsel's signature to a plea, which was said to have been indorsed on the plea, instead of being subscribed to it.

Counsel's signature to plea must distinctly appear at the foot of the plea, as well as in the rule to plead several matters.

1815.

GRANT
and others,
against

LE BLANC J. read the rule, and added that the signature indorsed on the plea was always to authorise the rule for pleading several matters; and the signature at the bottom of the plea was the counsel's verification of the propriety of contents of the plea.

Marryat had signed the plea. The officer of the Court, the clerk of the papers, was desired to produce the plea for inspection, and ultimately the rule was made absolute on terms.

1814.

DAVIS *against* NICHOLS.

23d June.

Where there is a special agreement, and it is conditional, the plaintiff must declare specially; and if the plaintiff affirms that the agreement was cancelled, he must prove that it was acquiesced in by the defendant.

LAWES, E. moved for a ~~new~~ trial. This was an action of *indebitatus assumpsit*, for work and labor, and materials found in erecting a mill; and a special agreement was proved on the trial, by which it was agreed that plaintiff should build a mill, and if it did not answer he should build another, and the defendant agreed to pay a specific sum.

LORD ELLENBOROUGH C. J. nonsuited the plaintiff, on the ground that he had not declared specially on the agreement, which was special and conditional.

Lawes now read the agreement, which stipulated, that if the mill did not answer, he would build another.

DAMPIER J. said there was a case where there was an alternative contract, and it was held it could not be declared upon but in the alternative (*a*).

Lawes cited *Bull. N. P.* 139. *Weaver v. Borrowes*,

(a) 8 *East*, 2. 2 *Bos.* and *Pul.* 119, n. a. 3 T. R. 531. 8 *East*, 8.

1 *Str.* 648. *Gordon v. Martin Fitzgibbon*, 302. and insisted that as the plaintiff had built a mill, which was sufficient, he had a right to declare generally.

1814.

DAVIS
against
NICHOLS.

LORD ELLENBOROUGH C. J. But there must be an acceptance of the thing done where the contract is special, or you must declare specially. It did not clearly appear in this case that the mill did answer; and so long as it continued *in dubio*, you should have declared specially, and have averred that the mill erected by the plaintiff did answer, so as to have taken upon yourself the burthen of proving that fact. Do you contend that you had abandoned the agreement? I nonsuited the plaintiff, because there was a special agreement; ~~and~~ that was conditional, and in the alternative.

DAMPIER J. If you proceeded on the agreement you should have declared specially; if you do not go on the agreement, then you should have proved that it had been abandoned, and that there was an acquiescence by the defendant in the abandonment; otherwise, in case of an agreement to build a house of a certain value, it might be built at double the expence, and the party be made liable upon it. You should shew that the work done was accepted: that is necessary, notwithstanding the cases you cite.

LE BLANC J. You should have shewn the work done and accepted, as done under the contract, and then possibly the general declaration would suffice.

New trial refused.

1822.

JONES against WOOLLAM.

Debt on a bond given to plaintiff as treasurer of a friendly society; plea, that the rules of the society had not been duly confirmed at sessions, pursuant to 33 G. 3. c. 54; held upon demurrer, that the plea was bad.

DEBT on bond to the plaintiff, treasurer of a friendly society, &c. The condition set out on *oyer* was for the payment of a sum of money to the plaintiff, or his successor, treasurer of the friendly society above named, or the executors or administrators of the plaintiff. Plea, that the bond was executed by the defendant to the plaintiff as treasurer of the society, and for the use and benefit of the society, and for no other cause or consideration whatever; and that the rules, orders, and regulations by which the society was governed, had not been exhibited, confirmed, or filed at the quarter sessions, pursuant to the statute 33 G. 3. c. 54. To this plea there was a general demurrer.

Barnewall argued that plaintiff, in the character of treasurer, had no authority to take the bond, because the rules of the society had not been filed, according to the provisions of the 33 G. 3. c. 54. s. 2.

PER CURIAM. If the plaintiff does not comply with the terms of the statute, he may not be entitled to the privileges conferred thereby; but as there is no express provision, avoiding securities given to treasurers neglecting to register the rules, the bond is good at common law, and the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

1814.

22d Nov.

ROE against ROE.

Though the original action was for damages, it is not demurrable in a replication in *scire facias* against bail, to pray judgment of debt and damages.

ESPINASSE argued special demurrer in *scire facias* on a recognizance against bail in an action of *assumpsit*, to which the bail had pleaded a replication in *scire facias* against bail, to pray judgment of debt and damages.

that there was no *ca. sa.* against the principal; and the replication set forth the *capias ad satisfaciendum*, and concluded with a prayer of execution for "the debt and damages aforesaid:" to which replication defendant demurred, and assigned as cause that no debt had previously been mentioned; but on the contrary, the original action being in *assumpsit*, damages only were recovered, and therefore the replication departed from the *scire facias*, and was inconsistent, &c.

1814.

Roz
against
Roz.

BAYLEY J. In *scire facias* the recognizance is a debt, and therefore here the replication is well concluded.

ELLENBOROUGH C. J. assented.

Judgment for the plaintiff.

DOE *ex dem.* BYNE *against* BREWER.

EJECTMENT on two demises; the first by A. and B., and second by C. Defendant pleaded *puis darrein continuance* at the last assizes, a release by A. To which there was a general demurrer, and joinder. This case was put down in the common paper; and when it was called on, it was mentioned by *Bolland*, for the defendant, that it was to be argued.

A plea *puis darrein continuance* of a release, by one of the lessors of the plaintiff, is bad on general demurrer, and the Court would not give leave to amend (a).

DAMPIER J. The only judge in Court, said he had been surprised by finding it put down for argument; that as long as the remedy by ejectment was held a legal fiction, and not a mere equitable remedy, it seemed impossible to maintain the plea, which was in effect, that after the lessor had made a lease, and

(a) Such a release cannot be pleaded; see 4 *M. and S.* 301, S. C.; and in general, it is said that a plea *puis darrein continuance* cannot be amended after the assizes are over. See *Hac. Ab. Pleas.* 2 *Yelv.* 181. *Freem.* 252. *Bul. N. P.* 309; but see 2 *Smith. Rep.* 659.

1815.

DOE *ex dem.*
BYNE *against*
BREWER.

parted with his interest to the lessee, he made a release of the lessee's interest.

Bolland said, that if it was no plea to the whole declaration, it might be desirable to amend, by applying the plea to the interest of that lessor only who had made the release; but

DAMPIER J. observed that the plea was pleaded *puis darrein continuance*, and that the defendant should have applied to amend earlier; and he seemed to think that in no form could the plea be supported, and refused leave to amend.

1815.

17th April.

HOPPE, *Executor*, *against* SYMONDS.

A contract to satisfy a debt by providing a cargo of wine, must be declared on specially; and an action will not lie for the old debt.

SCARLETT moved to set aside a nonsuit; the action was for a balance due to the testator, and for goods sold. It appeared in evidence that a contract was entered into, but which could not be effected. And he contended, that as the subsequent contract was not executed, therefore there was an accord without satisfaction. The second contract was to satisfy the balance, by a new shipment of wine; and as he had not performed that engagement, the plaintiff was at liberty to resort to, and sue for the original debt.

LORD ELLENBOROUGH C. J. There was no unqualified contract for purchase of the goods; it was only conditional, and you must declare specially on that; an agreement was made by the testator, in *French*, to be paid, not in money, but in wine; and the executor must take the contract in that shape.

Scarlett. The testator took it only on a proviso.

DAMPIER. Your argument is, that the loss of the ship put an end to the special contract; but I think it was a special contract, both in the testator and executor, and plaintiff should have declared specially.

Rule refused.

1815.

HOPPE, Executor,
against
SYMONDS.

RICHARDSON against GRIFFIN.

1816.

28th June.

PARKE argued in support of a writ of error, and objected to the declaration in *assumpsit* for misjoinder. Plaintiffs sued as assignees, and had joined counts for a debt due to the bankrupt, and for a debt due to them as assignees, for money lent and advanced by them as assignees; and he cited *Rogers v. Cooke*, 1 *Salk.* 10. which he contended was a similar case of misjoinder. The plaintiffs could not recover money paid by themselves with money due to the bankrupt, still less where they lent money as assignees, which assignees cannot do. Assignees cannot lend money; it was contrary to the 5 *Geo.* 2. c. 30. and the subsequent acts regulating the placing out money by the assignees. [PER CURIAM. That is only a deposit for safe custody. You say that the assignees cannot be lenders.] *Parke.* Nor can they pay.

In general, assignees of a bankrupt cannot lend; but as they may lend under circumstances by the 5 *Geo.* 2. c. 30. s. 32. counts may be joined for debt due to the bankrupt, and for money lent by the assignees as such.

ABBOTT J. You had better confine yourself to lending; there may be cases in which they may be entitled to pay: as where goods are distrained, may not the assignees pay to redeem the goods?

Littledale, contra. There is no misjoinder. Assignees are not such perfect representatives of other parties as executors; they are owners, and might recover in trover, without describing themselves as such; but it is not so with executors: and it is material as to executors, in which character they sue, with regard to costs.

1816.
 ———
 RICHARDSON
against
 GRIFFIN.

LORD ELLENBOROUGH C. J. It has been decided as to money paid, in the case of an executor, and therefore *a fortiori* in the case of an assignee, he may join a count for money paid by him as assignee.

Littledale contended that assignees might lend.

LORD ELLENBOROUGH C. J. It would be in a direct contravention of the object of all the statutes ; which is, that a speedy dividend should be made.

HOLROYD J. referred to the case of *Evans v. Mann*, *Comp.* 569. where it was held, that assignees may maintain an action either as assignees, or in their own name, for goods sold after the issuing of the commission.

Littledale. Suppose an extent issued, and it should be advisable to buy in, and assignees ; with the consent of creditors, advance money to the broker to buy in.

ABBOTT J. That is no loan ; if it is so applied, you cannot recover it back ; if not so, then you can, by money had and received.

LORD ELLENBOROUGH C. J. If an assignee lend money it cannot be as assignee, it is in contravention of his duty. If he had sued in his own name, he might have recovered ; but the question is, whether, having sued as assignee, he can recover the money lent as an assignee, when in that character he cannot lend.

Littledale. It may be rejected as surplusage.

LORD ELLENBOROUGH C. J. It is an allegation which must be made out in proof, which cannot be if they cannot lend.

BAYLEY J. Is there any case upon account for money lent by an assignee, or as an executor ?

1816.

RICHARDSON
against
GRIFFIN.

Littledale. I am not aware of any ; but there are many of goods sold and delivered (a).

ABBOTT J. They may be obliged to sell goods, but they are not compelled to lend the money.

LORD ELLENBOROUGH C. J. They must be particular acts to make exccutors lend ; but I know of no such instance as to assignees, and it would be very improper as to executors.

Parke, in reply. The statute only takes away responsibility from the assignees ; they are indemnified. The general rule is, that they cannot lend.

Scarlett read the 5 *Geo.* 2. c. 30. s. 32. “ in what manner, how, and with whom, and where the money should be paid in and remain ;” and he referred also to sect. 34.

Parke. The general rule is, that they cannot lend ; and if this case is an exception, the plaintiff should shew it.

BAYLEY J. This is after verdict ; and it will be presumed that every thing was proved in support of the verdict.

LORD ELLENBOROUGH C. J. There is some difficulty in saying, that if the assignee lent the money under the direction of the creditors, which direction they are enabled to give by the statute, he should not be able to recover as assignee. If you admit he can lend by the statute, it is difficult to say he cannot lend

1816. in this case; it will be presumed that he lent accord-
 RICHARDSON to the power given him by the act.
 against
 GRIFFIN.

Parke. Then he may lend as a private individual in his private capacity.

LORD ELLENBOROUGH C. J. The act says as agent.

BAYLEY J. If he can lend by the statute, we must presume after verdict that he lent according to the statute.

LORD ELLENBOROUGH C. J. My first impression was, that the plaintiff could not recover; for I knew no case in which the assignee could lend: but upon looking to the words of the section of the statute, I am not certain that an assignee may not legally, with the consent of the creditor, lend; and I must be satisfied that he cannot lend even for a moment, to say here, after the verdict, that he cannot recover: and the words of the section being so large, I cannot say that therefore he may lend; and even if it be an extremely improbable case, I cannot say that there is error in this verdict.

BAYLEY J. I admit that an assignee cannot join debts due to himself and to him as the assignee; it was so decided in *Hancock v. Haywood*, 3 T. R. 433; but under the statute he may lend, and therefore there is no error in the verdict.

ABBOTT J. I am of the same opinion; an assignee may often be obliged to pay money; there is no misjoinder.

HOLROYD J. There is no misjoinder; here the plaintiff sues throughout as assignee, and we cannot suppose he sues in any other character.

Judgment affirmed.

AMORY *against* BRODERICK.

1822.

10th May.

COVENANT upon a deed made between the defendant *Broderick*, one *Rawlins*, and the plaintiff, whereby, after reciting that *Joshua Rowe*, by bond of the 5th *December* 1814, became bound to the defendant *Broderick* in 8000*l.* conditioned for payment of 4000*l.* and that the bond had become forfeited by nonpayment; and that *Rawlins* had contracted with *Broderick* the defendant for the purchase of the bond, and the principal and interest due thereon, for 1700*l.* and that *Rawlins* was indebted to *Amory*, the plaintiff, in 1700*l.* for money advanced and paid, and that *Rawlins* had agreed to assign the bond absolutely to *Amory*; it was witnessed, that in pursuance of the agreement, and for the considerations therein mentioned, he *Broderick*, at the request and by the direction and appointment of *Rawlins*, assigned to *Amory* the bond, and all monies due or to become due thereon; covenant by *Broderick*, that he would not accept, take, or receive any of the principal monies and interest thereby intended to be bargained and sold, or make void the indenture, or any power or authority thereby given, or in pursuance thereof to be given; and that he would from time to time, at the request of the plaintiff, avow, ratify, and confirm all such actions, &c. as the plaintiff should lawfully make, take, bring, &c. in respect of the said premises, without being nonsuited, or otherwise releasing the same, except with the special consent of the plaintiff. The plaintiff averred, that after the making of the indenture, he, on the 12th of *May*, 1821, commenced an action in the name of *Broderick* against *Rowe*, upon the bond, to recover the principal and interest; yet, that the defendant not regarding his covenant, did not nor would, (although he was requested by the plaintiff so to do) avow, justify,

Covenant not to release a bond assigned by defendant to plaintiff. Breach, that plaintiff commenced an action in the name of defendant against the obligor, and that defendant did not, although often requested so to do, avow and justify the said action; but on the contrary thereof, executed a release to the obligee of all actions, bonds, &c. by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs, and other expences: upon special demurrer to this breach, it was held, first, that the averment of request was unnecessary, and that it therefore required no *venue*, inasmuch as it appeared that the defendant had, by executing the release, disabled himself from bringing any action upon the bond. Secondly, that it was no ground of demurrer to the whole breach, that the plaintiff was not entitled to recover the special damage.

1822.

AMORY
against
BRODERICK.

and maintain, ratify or confirm, the said action so commenced; but on the contrary thereof, after the making of the said indenture, to wit, on the 6th day of *March* 1821, &c. at, &c. the defendant did execute to *Rowe* a general release of all actions, bills, bonds, &c. By reason whereof the plaintiff was hindered from recovering the principal money and interest, made payable by the bond, and in proceeding in the action so commenced by him, and had also been deprived of the means of recovering the costs incurred by the action, and had sustained costs in endeavouring by rule of Court to set aside the release. Demurrer to this breach of the declaration, and the causes assigned, were, first, that there was no *venue* to the allegation of request in the declaration; and secondly, that by that breach the plaintiff sought to recover damages which he was not entitled by law to recover.

Gaselee contended, that a request of the defendant to confirm the action was necessary, and *Lowe v. Kirby* (a), *Pecke v. Mithwold* (b), *Banks v. Thwaites* (c), and *Back v. Owen* (d), are authorities to shew that a special allegation of request is necessary; and if it be a substantive allegation, it ought to have a *venue*. [BAYLEY J. The substantive breach begins by the words "but on the contrary thereof." In *Harris v. Mantle* (e), the breach assigned was, that the defendant had not used the premises in a good and husband-like manner, but on the contrary thereof, had committed waste. The defendant pleaded that he had not committed any waste, but used the premises in a good and husband-like manner; and it was held that the plaintiff was not at liberty to shew that the defendant had not managed the farm in a husband-like

(a) *Sir Wm. Jones*, 56.(c) 3 *Leon*, 73.(e) 3 *T. R.* 307.(b) *Ibid.* 86.(d) 5 *T. R.* 409

manner.] The plea there was, that he had not committed waste, and upon that issue he could only prove waste. [BAYLEY J. The plea applied to both parts of the breach ; and then the question was, what was the substantial part of the breach.] Secondly, the breach is bad, because the costs of the action, and the application to set aside the release, are grounds of special damage, and *non constat* that he would have obtained those costs in the action; and *Sutton v. Johnson* (f) is an authority to shew that that would be good ground of error, or in arrest of judgment.

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 ANONY
 against
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Chitty, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion that the first cause of demurrer assigned is not sufficient. A party is only bound to allege the request, where the object of that request is to oblige another person to do something. Here the defendant, by executing the release to *R.* has disabled himself from supporting any action whatever, and that is the substantial part of the breach ; and a request is wholly unnecessary. As to the second cause of demurrer, it is sufficient to say, that it is no good ground of demurrer to the whole breach, that the consequential damages are not recoverable. The plaintiff is entitled to recover some damage, and that is sufficient to support the breach.

BAYLEY J. The cause of *Duffield v. Scott* (g), is an authority to shew that the last ground of demurrer cannot be supported. So, too, in covenant ; if some of the breaches are good and the others not, it is no ground of demurrer to the whole declaration, but the plaintiff shall have judgment for the breaches well assigned (g). As to the other point, it is clear that the allegation of the request was unnecessary in this case, inasmuch as the defendant had, by executing the re-

(f) 1 T. R. 493. 510.

(g) 3 T. R. 374.

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lease, wholly disabled himself from bringing any action on the bond.

HOLROYD J. Where a party covenants not to do a thing, a breach is well assigned by shewing that he has done it. The effect of the breach assigned in this case is, that the defendant has done a particular act, whereby he has wholly disabled himself from avowing, &c. The allegation of request, therefore, was wholly unnecessary. On the other question, the formal words of demurrer shew that the objection cannot be sustained: the words are, that the said breach and the matters therein contained, are not sufficient in law. Now the objection is, not that the *whole* breach is insufficient, but that a part of it is bad. If, however, there be any breach of covenant assigned, in respect of which the plaintiff is entitled to recover, a further allegation that he has thereby sustained special damage, which by law he is not entitled to recover, will not prevent him from maintaining his action. If this objection be a ground of demurrer in itself, it should, at all events, have been confined to that part of the breach only.

BEST J. concurred.

Judgment for plaintiff.

1816.

27th Nov.

BARRY against LORD RODNEY.

If a declaration, amended in the same Term as delivered, though after a rule to plead be given, it is not necessary to give a fresh rule to plead; though if it is amended in a subsequent Term, a fresh rule is necessary.

PULLER shewed cause against a rule of *Ballantine*, to set aside a judgment for irregularity. The plaintiff delivered a declaration, and the defendant pleaded thereto. In the next Term, the plaintiff obtained an order to amend his declaration, with liberty for defendant to plead *de novo*, but no fresh rule to plead had been given; and the question was, whether such rule was necessary.

Ballantine, in support of his rule, cited *Salk*. 517, 8.
8 T. R. 78.

1816.

BARRY
against
LORD RODNEY.

ABBOTT J. then told *Puller* that the case was expressly against him, and the Master's opinion went along with it; and he read a minute from the Master's book, from which it appeared, that where the declaration is amended in the same Term in which the rule to plead has been given, no new rule is necessary; but where the declaration is amended in a subsequent Term, then there must be a new rule to plead in that Term; and therefore

Rule absolute.

HIGHMORE *against* **PRIMROSE.**

1816.

26th June.

TOPPING moved to set aside a verdict for the plaintiff. The action was on a bill of exchange, brought at the suit of the plaintiff, as indorsee. The declaration stated, that the bill was drawn on the 5th of June on the defendant, at two months, "for value received by *Richard Riley*," who was the drawer. The bill, when produced, appeared to be for value received generally. At the trial, it was contended that this was a variance; and as it was founded on a contract, the contract must be properly set out. But the objection was there overruled.

Where bill declared on, was "for value received by R.H." and the one produced was for value received generally, held a fatal variance (a).

LORD ELLENBOROUGH C. J. I thought the declaration had been value received generally, but it is value received by a particular person.

Rule *Nisi*, and afterwards absolute.

(a) But see *Grant v. Da Costa*, 3 M. and S. 351. *Chitty on Bills*, 6th ed. 356.

1817.

25th April.

The defendant cannot give in evidence illegality in the consideration of a bond, unless he pleads specially.

HARMER *against* ROWE.

THIS was an action of debt on a bond, and the defendant pleaded *non est factum*. On the trial the defendant set up the defence, that the bond was given to compound a felony. But LORD ELLENBOROUGH C. J. would not then hear any evidence in support of such defence, under the plea of *non est factum*, and a verdict was given for the plaintiff.

Peake, on behalf of the defendant, now moved to set aside the verdict, stating that he made the motion at the request of a considerable pleader under the bar, who was of opinion that such evidence might be given in evidence under the plea.

LORD ELLENBOROUGH C. J. In the case of a bond given to the sheriff, such evidence is admissible, because the sheriff can only take a bond in a particular way prescribed by the statute; and if it does not pursue the rules of the statute, it is absolutely void. In what case can a special plea be necessary, if it is not so in this?

BAYLEY J. It is well known, that the condition of a bond cannot be read under the plea of *non est factum*. The decision in *Colton v. Goodridge*, 2 B'a. Rep. 1108, is somewhat in point; for it was there held, that under the plea of *non est factum*, the defendant could not give in evidence that the condition was given in restraint of matrimony.

Peake then suggested, that the plaintiff had met with no surprise, for he had had notice that it would be given in evidence.

But THE COURT said, that it made no difference whether he received intimation of it or not; and refused the rule.

HUTCHINS *against* GILBIE.

1816.

18th June.

THE declaration stated that the defendant was attached to answer *James Toll Hutchins, &c.* and thereupon the said *James*, by his attorney, &c. The name *Toll* was omitted throughout the declaration. The defendant demurred specially, that it appeared that the plaintiff's Christian name was *James Toll*, and that he was called "*James*" only; and that it appeared that he was called by a different Christian name than that mentioned in the commencement of the declaration, and that it was not alleged that the promises were made to *James Toll*; and that they were stated to be made to the said *James*, though no such Christian name was previously mentioned; and now

Where the plaintiff's name was stated in commencement of declaration to be *James Toll Hutchins*, and the defendant demurred specially, that the plaintiff was named throughout in the subsequent part of the declaration, "*said James*" only, it was held sufficient, because *non constat*, but that "*Toll*" was part of the surname.

Campbell moved for judgment in the common paper.

BAYLEY J. It does not appear but that *Toll* is a part of the surname.

Judgment *Nisi*.

SHADBOLT *against* BERTHOUD.

1822.

18th May.

E. LAWES obtained a rule *nisi*, for signing judgment as for want of a plea, and why the defendant, or his attorney, should not pay the costs of the application, and in the mean time proceedings be stayed. The plea to an action on a bill of exchange, with usual money counts, was, that the plaintiff was indebted to the defendant in more than the amount of the damages declared for, namely, 60*l.* by recognizance in the Court of Exchequer; "as by the said recognizance remaining in the said Court (without saying remaining 'of record,') more fully ap-

If a special sham plea be so framed as to render it expedient for the plaintiff's attorney to consult counsel, the Court will permit the plaintiff to sign judgment as for want of a plea, and make the defendant or his attorney pay the costs.

1822.

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pears, and this he is ready to verify by the said record. Wherefore, &c." It was urged that this was a tricking plea, and calculated to throw a difficulty on the plaintiff, in determining whether he should take issue on the record, conclude to the country, or demur. The cases of *Thomas v. Vandermoolen* (a), and *Barclay v. Godslake* (b), were cited.

Espinasse shewed cause, and argued that plaintiff might readily reply to this plea, by saying that he was not indebted. No difficulty was thrown upon the plaintiff's attorney, rendering it necessary to take the advice of counsel, so as to bring the case within the authorities cited. There was no attempt to entangle him in the nicety of special pleading. He cited *Glyn v. Thorpe* (c).

PER CURIAM. The case of *Barclay v. Godslake* decides, that where the sham plea is of such a description as to make it necessary for the plaintiff's attorney to consult counsel, the Court will allow him to sign judgment. We think this is a case in which the attorney would feel it necessary to take further advice before he replied. These pleas are pleaded merely for the sake of delay, and the delay occasioned by them sometimes makes a great difference to the plaintiff in point of expence, and they ought not to be encouraged.

Rule absolute.

(a) 2 B. and A. 197.

(b) *Ibid.* 199.

(c) 1 B. and A. 153.

1821.

November.

DAVEY and others against PRENDERGRASS.

A parol agreement, giving time to a principal obligor, cannot

DECLARATION in debt on a surety bond, executed by the defendants, conditioned for the payment of the sum of £1000, cannot be pleaded at law as a defence for the surety.

ment within one month after demand of such balance, not exceeding the sum of 500*l.* as upon the settlement of accounts between the plaintiffs and *Samuel Prendergrass*, and *James Peter Prendergrass*, should appear to be due from the latter to the former, for coals to be delivered by them to the said *S. and J. P. Prendergrass*. Breach, nonpayment of the said sum after demand. The defendants craved oyer of the bond, and pleaded first, *non est factum*; and second, a special plea in bar that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal debtors to pay by instalments, and had taken a warrant of attorney to pay by monthly instalments of 100*l.* each, a balance of 1099*l.* 9*s.* found to be due from the latter to the former, upon an adjustment of accounts for goods sold and delivered, with a power of issuing execution in case of default of payment of any one instalment when due. To this last plea there was a demurrer, and joinder in demurrer.

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W. H. Maule, for the plaintiffs. The question in this case is, whether giving time to the principal is a defence at law to an action on a bond against the surety. There are a great variety of cases on bills of exchange and bail bonds, which do not apply; and no case can be found in which such a defence has been pleaded to a bond. In *Donnelly v. Dunn*(a) it was held, that bail cannot plead the bankruptcy and certificate of their principal to an action of debt upon a recognizance of bail; and in *Bultell v. Jarrold*, which was a similar action of debt, the defence pleaded was time given to the principal, to which there was a demurrer; and in the Court of Exchequer judgment was given for the plaintiff, on the ground that this could only be

(a) 2 B. and P. 45.

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taken advantage of by an application to the equitable jurisdiction of the Court: and this judgment was successively affirmed, both in the Exchequer Chamber and in the House of Lords. In giving relief on bail bonds, the Courts proceed on the equitable jurisdiction given them by statute 4 and 5 *Anne*, c. 15; s. 20; but that is not done by plea, but by summary application to the Court. Suppose an action of debt on bond, brought for the benefit of an assignee, in the name of the obligee, and a plea of a release by the obligee, the Court perhaps might, on a proper case being laid before them, order the plea to be taken off the file; but they would not allow the facts, if replied to, to be a sufficient answer to the plea. The cases of bills of exchange depend entirely on the law merchant, and are quite distinguishable. *Binke's* case, mentioned in *English v. Daley* (c), was a case in equity. The practice of granting injunctions in courts of equity in these cases, is also an authority to shew that this is not a good defence at law; and no such plea as the present can be found in any of the books of entries.

Chitty, contra, contended, that the principle upon which courts of equity proceeded applies equally to a court of law. It is to be found laid down in *English v. Daley* (c), and it is this; that where the agreement with the principal alters the situation of the security, by postponing the time of payment, the surety is released from his liability. *Samuel v. Howard* (d), *Law v. East India Company* (e), and a variety of other authorities are also to the same point. It must be admitted, that the cases in courts of common law are questions arising for the most part on bail bonds, as *Rex v. Sheriffs of Surrey* (f), *Thomas v. Young* (g), *Bowsfield v. Torrer* (h), *Croft v. Johnson* (i).

(c) 2 *B. and P.* 62.(e) 4 *Ves.* 824.(g) 15 *East*, 617.(i) 5 *Taunt.* 319.(d) 3 *Meriv.* 272.(f) 1 *Taunt.* 159.(h) 4 *Taunt.* 456.

In *Moore v. Bowmaker* (k), GIBBS C. J. says, "the principle was first adopted in the Court of Chancery, that if a creditor gives time for payment to his principal debtor, without giving notice to the surety, the latter remains no longer liable to the debt." And then he adds, "the courts of law in late days have acted on the same principle in cases of bail." So that, it should seem, that learned Judge treats it as a principle which could be extended properly to courts of law. Now that principle ought to be extended to this case; for otherwise the obligor and obligee might combine together to defraud the surety. In *Orme v. Young* (l), this point came before GIBBS C. J. but was not decided. He also cited *Beadle's case* (m), and *Greeningham v. Ewer* (n).

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ABBOTT C. J. From the nature of the security it cannot be said that the sureties sustained any prejudice by what has taken place; for if the first 100*l.* was not paid immediate execution might have issued, and it could not have been set aside. The ground however of my opinion in this case is, that general rule of the common law, which requires that the obligation created by an instrument under seal shall be discharged by force of an instrument of equal validity. The operation of that rule is indeed sometimes such as to make it imperative upon a court of equity to interpose, and grant relief; but it by no means follows that the rule of law is to be broken down, because a court, having jurisdiction of another kind, will interpose where there is a particular case in which the rule of law may be found to operate harshly. There is great objection to a court of law taking upon itself to act as a court of equity, because they have not the means of doing that full and ample justice which the particular case may

(k) 6 Taunt. 382.

(m) 3 Leon. 159.

(l) Holt, N. P. c. 84.

(n) Cro. Eliz. 396.

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require. We ought not therefore to interpose in a matter which seems peculiarly to belong to the jurisdiction of a court of equity. If a parol agreement is entered into to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond, conditioned for payment of money at a certain day, it will not prevent the party from proceeding at law immediately, whatever the consideration for the delay may be. And if that be so, how can the giving of time to a third person by such an agreement prevent the obligee of the bond from proceeding at law against the surety? There may indeed be such a consideration for the agreement, as may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law. But a parol agreement of this nature can never operate to controul the obligation of this bond in a court of law. The decisions which have taken place in the courts of equity in cases of this nature have always, as I understand them, proceeded on the notion, that at law the thing prayed for could not be done. Bills of exchange stand upon a very different footing; there the law merchant operates, and the courts of law decide upon them with reference to that law. Guarantees for the payment of debts are not in general instruments under seal; and there is no strict technical rule, which as to them prevents a court of law from looking to the real justice of the case. The cases of bail and replevin bonds are provided for by acts of parliament, giving to the Court an authority over them. But in both these cases, the jurisdiction is exercised always upon special application, founded upon affidavits, and not upon plea. A recognizance of bail stands upon a different ground from bail bonds, as to the jurisdiction of the Court. There the jurisdiction is not founded upon statute, but upon a general authority in the Court, to see that an improper use is

not made of its own records. Therefore in that case, as well as in the case of bail to the action, and of bail to the sheriff, if the Court sees that an improper use is attempted to be made of the security which the party has given, it immediately interferes. And that also is always done upon special application to the Court, upon affidavits setting forth all the circumstances of the case. In the case of *Bultell v. Jarrold*, in the House of Lords, which has been referred to, in which an attempt was made to put the matter on the record, by way of plea, it was held that it was no bar to the action; so in this case, which appears to be the first of the kind brought before this Court, although similar cases must have occurred very frequently, I am of opinion that we, deciding on legal principles, are bound to say that this plea is no answer to the plaintiff's action. There must, therefore, be judgment for the plaintiff.

HOLROYD J. The plea in this case is not, I think, good in law. The circumstances here stated neither amount to a performance of the condition, nor to a legal excuse for non-performance of it. The bond which has been executed by these two sureties is conditioned for the payment of any balance not exceeding 500*l.*, that may be due for goods sold upon credit to two other persons, within one calendar month after demand made. The effect of the plea is, that an unreasonable time was given to the original debtors, and that a warrant of attorney was taken for that purpose, having been given in pursuance of a parol agreement. Such an agreement, and the taking of the warrant of attorney, in my opinion, does not constitute in law a payment of the original debt, nor an annihilation of it. The mere giving time by parol without consideration, is not even binding on the party himself. In this case there seems to have been some consideration for the

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time given; namely, the giving the warrant of attorney, which would give the plaintiff a debt of higher nature, by allowing a judgment to be entered up in case of non-payment of the first instalment. That certainly was a good consideration for the forbearance; but the merely giving an engagement that a man shall not sue for a limited time, is not a release in law of the original debt. An agreement that a man shall not sue at all, with a good consideration for it, amounts to a release, and would be an annihilation of the original debt; but an agreement to give a limited time to pay the debt, as in this case, does not destroy the original debt, nor the liability to the payment of it. The original debt then remains; and by the condition of this bond, the obligors are bound to pay within a month after demand made of them. There is no performance of the condition of the bond, nor any release of the original debt. None of the circumstances mentioned in the plea amount to a performance of the condition; if they could, the condition would then be considered as performed, and the defence would be good in law. But that is not so; the whole defence set up arises upon a parol agreement. Now, suppose to that parol agreement the obligors had been parties, and the obligees had stipulated that they would not sue on the bond; still, unless that agreement was of as binding effect as the bond itself, it would avail nothing; for a mere parol agreement cannot be pleaded in bar, unless by operation of law it amounts to the performance of that which is the subject matter stipulated for by the condition. Neither of these cases exist from the circumstances which have been pleaded in this case; and therefore I think this plea does not amount to a defence in law. All the cases, or nearly so, upon this subject, except cases on bail bonds, in which this Court entertains a sort of equitable jurisdiction, have been cases decided in courts of

equity ; and I think that the very principle upon which courts of equity give relief is, that the circumstances under which they give relief do not afford a good defence in point of law. I think this plea is bad.

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BEST J. was of the same opinion.

Judgment for plaintiff (a).

(a) The Court of Chancery afterwards refused relief.

ORTON *against* BUTLER.

1822.

3d May.

THE first and second counts of the declaration stated that the defendant falsely and fraudulently affirmed to plaintiff, that the defendant had given more for a commodity he had purchased for the plaintiff than he really had given, and thereby fraudulently obtained from plaintiff the larger sum. The third count was as follows: " And whereas also the said defendant afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, had and received for the use of the said plaintiff a certain sum of money, to wit, the sum of ten shillings, to be paid by the said defendant to the said plaintiff upon request; yet the said defendant, not regarding his duty in this behalf, but contriving and fraudulently intending to hurt, injure, and prejudice the said plaintiff in this respect, hath not, although often requested, paid to the said plaintiff the said last-mentioned sum of money, or any part thereof, but hath wholly neglected and omitted so to do; and on the contrary thereof, afterwards, to wit, on, &c. at, &c. converted and disposed thereof to his own use." To the first and second counts the defendant pleaded not guilty; and to the third count there was a general demurrer and joinder thereon.

A count, stating " that defendant had and received for plaintiff a sum of money, to wit, 10s. to be paid by defendant to plaintiff upon request; yet defendant, not regarding his duty, had converted and disposed thereof to his own use," is laid in *assumpsit*, though colourably in *trover*, and cannot be joined with counts in case; and it is demurrable generally, though the demurrer goes only to that particular count.

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Alderson in support of the demurrer. In this case there is a misjoinder. The first and second counts are framed in *tort*, and the third in *assumpsit*; consequently they cannot be joined, and judgment must be given for the defendant. Though the third count is colourably framed in *tort*, it is in substance and effect a count in *assumpsit*, for money had and received, which cannot be joined with the other counts. In the case of *Judin v. Samuel (a)*, the Court said there might be a judgment for the plaintiff if there was any one good count, inasmuch as the demurrer went to the whole declaration; but it seems to be admitted, that if there had been a demurrer to the objectionable counts, the defendant would have been entitled to judgment. In this case the demurrer is to the objectionable count, and therefore in this respect there is a difference between the two cases. The same doctrine was held when the above case came before the Court of Error. The count in this case begins in *assumpsit*, and ends by saying, that instead of paying the money which the defendant had received for the use of the plaintiff, he converted the same to his own use. The proper remedy for such an injury as the detention of money, is properly *assumpsit*. If this innovation in the forms of pleading were permitted, the defendant would be deprived of many advantages, of which he would be entitled to avail himself, if the count was properly framed in *assumpsit*. For instance, suppose the defendant has a set-off, how is he to set-off in an action framed in *tort*, a debt due to him from the plaintiff? He cannot; because the statute 2 Geo. 2. c. 22. s. 13. and 8 Geo. 2. c. 24. s. 6. speak of mutual debts. Again, suppose the action is brought within the jurisdiction of a Court of Requests in *London*, and the plaintiff recovers less than forty shillings; how is the

defendant to recover his costs under the stat. 3 Jac. 1. c. 15. s. 4. if the plaintiff is permitted to sue in *tort* for a cause of action in *assumpsit*? If this ingenious device were permitted, the plaintiff might evade the statute altogether. But the hardship would not stop here: suppose a liability in contract against three, and the plaintiff declares in *tort* against two only; the defendants would be deprived of the benefit of a plea in abatement (*b*); and the plaintiff would thus be enabled to make that a separate, which is a joint liability. All the common money counts in *assumpsit* may, by this inroad upon the established forms of action, be converted into actions on the case. No instance of this kind is to be found in any of the books of entries; and such innovations are to be discountenanced.

Tindal, contra. The count demurred to is in substance a count in *trover*, and may be joined with other counts: it alleges a delivery of money to the defendant, and a misfeazance. In a count in *trover*, it is sufficient to allege the conversion, without the finding: it is sufficient, to constitute a good count in *trover*, to state a bailment or delivery, and then allege that the defendant wrongfully converted. However, if it be objected that the money alleged in this count to have been converted, is not stated to be monies numbered in a formal manner, the defendant should have taken advantage of it on special demurrer, and plaintiff then might have amended on payment of costs. The plaintiff should not have demurred to this count only, but to the whole declaration, in order to avail himself of the misjoinder (*c*). The demurrer is bad; for being directed to this count only, supposing it as a count in *assumpsit*, defendant having pleaded the general issue to the other counts, is not at liberty to object to this particular count; for in all cases of demurrer for mis-

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(b) See *ante*, page 1.

(c) *Samuels v. Judin*, 6 East, 333.

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joinder of counts, the demurrer must go to the whole declaration. *Kingdom v. Nottle (d)*. This count, at all events, is only demurrable for informality and uncertainty, in not stating a conversion of monies numbered. At all events, this count would be good if it described it to be for ten shillings, monies numbered. [ABBOTT C.J. I am not prepared to assent to that. *Trover* would lie for ten pieces of coin called shillings, I have no doubt; but in the way you put it, I have great doubt;—and then you could not recover, unless the specific pieces are described in the declaration.] On account of its uncertainty, this objection can only be the subject of a special demurrer. [ABBOTT C.J. It goes higher than want of certainty: you do not mention any thing which can be the subject of an action of *trover*.] The substantial question is, whether this is to be considered as a count in *trover*; if so, it may well be joined with the other counts in case.

Anderson, in reply, was stopt by the Court.

ABBOTT C.J. The law has provided certain specific forms of action, suited to the recovery of damages, for certain particular injuries. We have a smaller variety of forms in our law than is to be found in the civil law: we have not many, but it is of importance that those we have should be preserved, and that parties should not be permitted, by their own invention, to convert that which from the earliest times has been considered as peculiarly the subject of *assumpsit* or debt, into an action of *tort*. We are to look with jealousy at any innovation of that kind, so that nothing like a precedent shall be established, tending to destroy those sound distinctions which have been established by the wisdom of our ancestors. What is the form of this count? (*stating it*.) This is said to be a

count in *trover*: now I think the action of *trover* can only be maintained for some specific property, and in that respect it does not differ from the action of *detinue*. I used the word property, in order that I may not be supposed to confine it to goods and chattels, properly so called; because *trover* will lie for a bank note or promissory note. It is true also that it will lie for so many pieces of silver, although they are in the shape of coin; but then they are to be described as specific articles. In the cases in which *trover* lies, the defendant does not redeem himself from liability, by tendering some other article of equal value. The action in such case proceeds upon the foundation of the plaintiff being entitled to the same identical article. Does this count allege that any specific article, or any specific property, was converted? It speaks of a sum of money merely, which is an abstract idea. The money may be composed of two crown pieces, four half-crowns, ten shillings, or twenty sixpences. I am of opinion, therefore, that there is not merely a want of certainty in the count, but that the thing described is not that for which *trover* will lie. It is merely described as a sum of money, which does not convey the idea of any specific article of property; and on that ground I think the count is demurrable.

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BAYLEY J. We are to resist every innovation upon the ancient forms of action, unless we can clearly see our way through all the consequences which may result from the innovation. At common law, there were certain formed writs in the register, such as actions in *detinue*, *assumpsit*, debt, covenant, &c. The statute of *Westm. 2*, 13 *Edw. 1*. c. 24. gave the action on the case; and the object of that statute was to give a remedy in those instances in which there was no formed writ in the register. In *Slade's case* (e), the question

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was discussed, whether for the bargain and sale of wheat and rye growing on the land, the proper action, was *assumpsit*, or case; and it was held, that *assumpsit* was the proper form of action. From that time down to the present, the remedy for money had and received has been either debt or *assumpsit*, and no third description of action has been brought. Why, then, is the plaintiff to be at liberty, at this distance of time, to call in aid that statute to which I have referred, and form a third description of action for a cause for which there had been two forms previously established? What would be the consequence of such an innovation?—why, that in very many instances the provisions which have been made from time to time by different acts of parliament (considering the action of debt and *assumpsit* as the proper remedies for money had and received), would, by that means, be evaded. One or two instances have been put in argument on behalf of the defendant, shewing the mischief that might result from a departure from the usual form of action in such cases. The observations resulting from the statute 3 *Jac.* 1. c. 15. s. 4. and similar statutes, enabling persons to recover small debts within local jurisdictions, and giving the defendant costs, in case the plaintiff does not recover damages to a certain amount, are exceedingly strong, and, I think, unanswerable. I am of opinion, therefore, that the plaintiff is not at liberty, at this distance of time, to resort to a new description of action, contrary to the long settled usage in such cases.

HOLROYD J. This count, in point of form, is not like a count in *trover*. It is argued, however, that it is so in effect; namely, by stating that it was money had and received by the defendant to the use of the plaintiff, to be paid to him on request, and that in the latter part it charges a conversion. Now there is no

part of this count which alleges the money to be the property of the plaintiff, or that it was ever in his possession; and it is held in *Com. Dig. tit. Action on the Case upon Trover, G. 1.* that the declaration must shew that there is a property and possession in the thing in the plaintiff. All that is stated here is, that the defendant received from some other person a sum of money to be paid to the plaintiff. That does not take away the right of the property in the defendant, unless the declaration shews that the plaintiff has assented to the defendant's receiving it. There is nothing here to shew any assent on the part of the plaintiff, that it should become his money at the time of the alleged conversion. The declaration must shew that the property belonged to the plaintiff at the time the action commenced. Besides this, I take it there never was an instance of an action in this form maintained; the regular form of action in the register being debt and *assumpsit*. In *Slade's* case, the question was determined, mainly on the ground of ancient precedents in the Register and elsewhere. The Court consider them as having great weight in their determination; and for the same reason I am clearly of opinion, that this count cannot be sustained.

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BEST J. I am of the same opinion. This is a departure from all precedents; and even if I were satisfied that it might not be attended with inconvenience, still I think we ought not to permit any innovation upon the ancient forms of proceeding, which are to be considered as part of the settled law of the land. As well might we alter the doctrine of descents as to freehold property, as alter the long established forms prescribed for the recovery of debts. We are not at liberty to do so. There is a broad distinction between causes of action arising *ex contractu* and *ex delicto*. This is one arising *ex contractu*; there is no wrong

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stated, but merely a breach of contract ; and the plaintiff is not at liberty to convert a mere matter of contract into a *tort*. The consequences of a departure from the ancient forms have been well pointed out in argument. In addition to those may be mentioned, that by altering the remedy, the defendant would be deprived of his plea of tender, and also of the advantage of paying money into Court. But if no such consequences were to follow, I think we ought to adhere to those ancient forms which have been perfected by the wisdom of ages, and confirmed in their utility by the experience of many centuries.

Judgment for the defendant, on
demurrer (*f*).

(*f*) *Vide* *Dixon v. Clifton*, 2 *Wils.* 319 ; and *Gowett v. Radinge*, 3 *East*, 62.

POSTEA.

SANDFORD *against* PORTER, *and same against*
CLARKE.

1820.

12th Feb.

THESE were actions of debt, founded on the statute 2 & 3 Edw. 6. c. 13. for not setting out tithes. The defendants severally pleaded *nil debet*; and at the last summer assizes for the county of *Essex*, the jury found for the plaintiff in the first-mentioned case a verdict for 70*l.*, being the single value of the tithes not set out; and in the second case a verdict for 40*l.*, being of the like denomination.

Bolland now moved for a rule to shew cause why the *postea* in each case should not be amended, by entering the verdict for treble the value found by the jury, pursuant to the statute on which the actions were founded; and he referred to *Baldwin v. Gillett* (a), as an authority in support of the motion; but

Where the jury, in an action of debt, on 2 & 3 Ed. 6. c. 13. which gives treble value for not setting out tithes, found damages which amounted only to the single value, held that the Court could not amend the *postea*, by entering the verdict for the treble value.

PER CURIAM. This motion cannot be sustained. The action is founded in debt, and the defendant has pleaded *nil debet*. Upon that issue the jury have found that the defendant owes the single value. The statute requires that the treble value should be given by the jury. How then can we supersede the office of the jury, by amending the *postea*, in a matter which exclusively falls under their consideration? If we were now to amend the *postea*, as required, that would be error on the record. We therefore cannot amend

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SANDFORD
against POR-
TER, and same
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the *postea*. Had this been an action for penalties, and the jury, upon the plea of not guilty, had found that the defendant was guilty of the premises, and that the single value of the tithes was so much, then the plaintiff might come to the Court, to have the judgment entered up for treble value, as given by the statute. But if the jury, as in this case, find that the defendant owes the plaintiff so much, we are bound to conclude from the *postea*, that they have taken into consideration all the damages that the plaintiff was entitled to recover. There is nothing in this case to shew that the jury have only found the single value, and we cannot allow the matter to be explained by affidavits. In the case referred to, of *Baldwin v. Gillett*, the jury found the sum, *as and for single damages specifically*; but here the verdict is entered generally, without any thing to shew that the jury have found the single value only. We therefore cannot amend the *postea*.

Rule refused.

N. B. A similar motion was made in these cases on the last day of last Term; but the Court then said, that if there was any mistake as to the manner in which the verdicts were entered, reference must be had either to the associate, or to the notes of the learned judge, for the purpose of amending the *postea*. This suggestion not being attended with the desired effect, the parties came to the Court as above stated.

POUNDAGE.

ANONYMOUS.

1816.

24th Jan.

JONES, D. moved to set aside proceedings for irregularity, on the doctrine in *Baker v. Sydee (a)*, that the 43 G. 3. c. 40. s. 5. only permits the sheriff to levy poundage and expences on executions against defendants; whereas this was an execution for the costs of *non pros.* and the sheriff's poundage and expences had been levied.

The sheriff is not entitled to poundage on execution upon a judgment of *non pros.*

Rule *Nisi* on that ground, which afterwards was made absolute.

(a) 7 Taunt. Rep. 179.

PRINCIPAL AND AGENT.

BROWN *against* STATON.

1816.

9th Nov.

F RERE, Serjeant, moved to set aside a verdict for the plaintiff for 28*l.* The action was brought against an auctioneer, for a breach of his duty, in suffering a purchaser to take away the goods without paying, the purchaser having claimed to set off a debt due to him against the goods. The evidence produced established that it was the custom of the trade of the auctioneer not to deliver the goods till paid for. The count on which the verdict was taken, was for not duly accounting for the proceeds of the sale; and the defendant proved an

An auctioneer, who delivered goods without receiving the price from the purchaser, was held liable, on a declaration for not giving a full account of the full produce of the goods.

1816.

BROWN
against
STATON.

account stated between the plaintiff and the defendant, as to the proceeds of the sale, with a set-off of the money due to the purchaser.

LORD ELLENBOROUGH C. J. The auctioneer was employed to sell the goods, and not to pay the debts; and it was meant that he should pay over the price of the goods to the plaintiff. A just account is not one of pounds, shillings, and pence, but of the price of the goods: good sense has settled that.

BAYLEY J. It cannot be contended that an agent has duly accounted unless he pays over the full price.

Rule refused.

PRISONER.

1804.

13th Nov.

GALOSSIS against LONGHURST.

A prisoner is not to be discharged under Lords' act, where he has before had the benefit of the general insolvent act (a).

THE defendant came up to take the benefit of the Lords' act.

Espinasse opposed him, on the ground that he had taken the benefit of the insolvent act before. At first his answers induced a supposition that it was the Lords' act, 52 Geo. 2. and it was on that ground that *Espinasse* opposed his discharge. It was reported by the clerk of the rules, that it extended to general insolvent acts only; and it was said to have been so decided in a case of *Annesley v. Shee*.

GROSE J. was of that opinion. It afterwards appeared, that he had taken the benefit of the general insolvent act, and he was on that ground remanded.

(a) See *Tidd*, 7th ed. 383; but this is altered by 52 Geo. 3. c. 34. s. 2.

PROCESS.

WILSON *against* STAFFORD.

1820.

31st Jan.

COMYN moved for a rule to shew cause why the copy of the writ of *latitat*, and the service thereof, should not be set aside for irregularity, with costs, and proceedings in the mean time stayed. The irregularity complained of was, that in the notice to appear at the foot of the copy of the process, as required by 5 Geo. 2. c. 27. s. 4. the defendant was described by the surname of *Stratford*, whereas, in the copy of process, he was described by his name of *Stafford*; but in the body of the copy of the process, as well as at the foot, the defendant's Christian name was correctly set forth. In support of the objection, he referred to *Jones v. Armytage(a)*.

Copy of a writ against *John Stafford*, and notice at foot to appear, calling the defendant "*John Stratford*, you are served," &c. was held to be a variance of which the defendant could not avail himself, on motion to set aside service of process for the irregularity.

BAYLEY J. The names are so near alike, that I think I ought not to grant a rule *nisi*, to afford the defendant assistance in a summary way. He may plead in abatement if he pleases.

Rule refused.

(a) 2 Bos. and Pul. 38.

BADGETT *against* LEE.

1816.

3d May.

HUTCHINSON moved to set aside the proceedings for irregularity; the defendant's name in the writ being *John*, and in the notice to appear, *Joseph*: one of which, he contended, must be irregular.

John in the writ, and *Joseph* in the notice, held amendable, and therefore a rule to set aside same for irregularity was refused.

1816.

BADGETT
against
LEE.

THE COURT asked, which was wrong ?

Hutchinson said, the notice was right.

THE COURT. Have you an affidavit of that ?

Hutchinson. None ; only the affidavit of the defendant is sworn as *Joseph*.

LORD ELLENBOROUGH C. J. We cannot draw the conclusion from that ; we should know what was right. It can be amended ; and when amended your rule would be discharged.

Rule refused.

1813.

1st July.

ANONYMOUS.

A writ having a wrong return, will not be aided by a correct day being mentioned in notice to appear.

ANDREWS shewed cause against a rule obtained by *G. Marriott*, to set aside a writ for irregularity, on account of wrong return therein ; and contended, that if the English notice at the foot was right it was sufficient, as the only object of the process is to inform the defendant when he is to appear and defend.

BAYLEY J. cited a case, in which the Court said they would permit the party to amend ; but if they departed from the known forms, there would be a thousand whimsical returns.

Rule absolute.

1813.

8th Nov.

ANONYMOUS.

Date of English notice in figures, immaterial ; 2. writ not signed by proper clerks, immaterial ; 3. king's title not material in writ.

CAMPBELL moved to set aside proceedings for irregularity, on three grounds, 1st. That the date of the year in the English notice was in figures ; 2d. That the writ was not signed by the proper clerks ; 3d. That the king's title was stated to be of *France and Ireland*,

instead as directed by the king's proclamation since the union of the united kingdom.

1813.

ANONYMOUS.

LE BLANC J. expressing his opinion, said, that none of the objections were material.

Rule refused.

ANONYMOUS.

1815.

1st June.

HEATH moved to set aside proceedings on a bill of *Middlesex*, the process having been served after eleven o'clock at night.

It is not irregular to serve process even after 11 at night, process not being within the rule as to service of notices, &c. before 10 o'clock at night, but may be served at any time of the night (a).

BAYLEY J. after referring to the rule, observed, that it did not extend to process which is in the place of an arrest which may be made at any time. The rule only extends to notices, &c.

Rule refused.

REX against SHERIFF of MIDDLESEX.

1816.

27th May.

LAWES, on a former day, had obtained a rule to shew cause why an attachment issued against the sheriff should not be set aside, under these circumstances. The plaintiff issued the writ against the defendant in a wrong name, by virtue of which the sheriff arrested him, and kept him in custody till he

The sheriff who knowingly arrests a person sued by a wrong name, is a trespasser; but if he has taken a bailbond he is liable to an attachment if bail above be not perfected (b).

(b) The sheriff is bound only to arrest the person named in the writ; and when the sheriff is informed of a *misnomer*, or misdescription of the person, though the party be pointed out as being the one whom the writ is issued against, yet he is not bound to arrest. 1 *Bar. and Ald.* 647. 8 *East*, 328. 2 *Campb.* 270. 6 *T. R.* 234.—Where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it; for mistake, induced by his own affirmation, cannot give him a right of action. *Per Lord Ellenborough* C. J. 1 *Bar. and Ald.* 650.

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REX
against
SHERIFF OF
MIDDLESEX.

entered into a bail bond, which he did in his right name. The sheriff being ruled to return the writ, returned that he had taken the body of the defendant sued by the wrong name, whose body he had in custody. The plaintiff not finding the bail put in, in the name of the cause in which the writ issued, sued out an attachment against the sheriff, for not bringing in the body.

Marryat now shewed cause ; and

Lawes, in support of his rule, contended, that the the sheriff was not bound to arrest the defendant when he was sued by a wrong name ; and to this effect he cited 1 *Marsh*, 75. 2 *Taunt*. 399.

Marryat, *contra*, distinguished those cases, and said, that there the plaintiff had pointed out the defendant ; but here the plaintiff's letter contained the warrant, and pointed out the *misnomer*, and the sheriff had therefore clearly full knowledge of the *misnomer* ; besides which, as the sheriff had taken a bail bond, there was no ground for setting aside the attachment.

LORD ELLENBOROUGH C. J. The sheriff has clearly been a trespasser, by arresting the party by a wrong name ; but the question is, whether the defendant, by giving the bail bond, has not consented to the arrest, and waived the objection. It seems to us a waiver.

ABBOTT J. I do not see how the bail bond could be available, if the sheriff was a trespasser.

Rule absolute with costs.

PROCHEIN AMI.

ANONYMOUS.

1814.

7th Feb.

SPANKIE moved that the defendant might give security for costs, and that an efficient *prochein ami* might be appointed. He relied on *Weston v. Withers*, 2 T. R. 511. *Anon.* 2 *Marsh. Rep.* 4. *Doe Selby v. Alston*, 1 T. R. 491. & 2 *Taunt.* 61.

Quære, If the Court of King's Bench will grant a rule for an efficient *prochein ami* to be appointed, and security to be given for costs. Motion is too late after moving to put off trial.

PER CURIAM. Whether such a motion as this would at any time be maintainable, is a question ; but here it is at all events too late : there has been a motion to put off trial, and other proceedings have been had, and the party is much too late.

Rule refused

PROHIBITION.

ANONYMOUS.

1820.

4th Feb.

F. POLLOCK moved for a writ of *prohibition*, to restrain the High Court of Admiralty from entertaining a suit instituted in that Court by several part owners of a ship, against one, to restore the possession of the ship's registry. He contended that the Court of Admiralty had no jurisdiction over the ship's of ship owners, as against an individual owner, to restore the possession of the ship's registry, in order that she may sail on her voyage.

It seems that *prohibition* will not lie to restrain the Court of Admiralty from taking cognizance of a suit instituted in that Court by the majority of the ship's registry.

1820.

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registry, unless the ship itself was under the cognizance of the Court; and for this there were several authorities in *Robinson's Reports*. Here the vessel herself was not in the Court of Admiralty; and therefore he submitted, that the Court had no jurisdiction over the registry, which was one of the ship's muniments. This was a proceeding instituted by several owners, to compel a single part owner to deliver up the possession of the registry, the possession of which he claimed a right to detain to himself, until the other part owners gave security before the ship sailed. This, then, was in effect an action of trover, for the conversion of the registry; and the Court of Admiralty could not entertain jurisdiction over a question which exclusively belonged to the cognizance of the courts of common law. If the Court of Admiralty had jurisdiction over the ship itself, probably the right to the registry would incidentally come under consideration; but not so where the Court had not the jurisdiction *in rem*. There were several authorities to shew that the Court of Admiralty had no jurisdiction to try the right to a particular vessel, merely because it was incidentally subjected to the cognizance of the Court, under circumstances which were properly of admiralty jurisdiction. Here, undoubtedly, the right to the vessel was not in dispute; but the question was, whether the Court of Admiralty could entertain jurisdiction over the registry, in a suit which savoured of common law cognizance alone.

BAYLEY J. (a) At present it appears to me that this is not a case in which this Court can grant a *prohibition*. I apprehend, that where there are several part owners of the vessel, who are desirous that the ship shall go upon a given voyage, contrary to the wishes

(a) Abbott C. J. was gone to Guildhall, and Best J. was absent.

1820.

ANONYMOUS.

of the remaining part owners, the latter may institute a suit in the Court of Admiralty, in order to compel the opposite party to give security before the ship is allowed to proceed on the voyage. In like manner, where one part owner has the possession of the registry, without which the ship cannot go to sea, if the other part owners desire that it shall go, they may institute a suit in the Court of Admiralty, to compel him to give up the registry upon such terms as the Court shall think proper to impose. The right to the vessel in this case is not in question; and therefore that objection does not arise. It is not suggested that the person who holds the registry is a broker, having a lien upon that instrument; he stands merely in the situation of a single part owner, and I do not know of any other mode of getting at the registry, but by proceeding in the Court of Admiralty, which may direct in what custody the registry shall be kept.

HOLROYD J. Undoubtedly where there is a disputed right in the vessel, and the right is put in issue, that would be a ground for coming to this Court for a *prohibition*, to restrain the Court of Admiralty from taking cognizance of the question. But where disputes arise between the owners of a ship about sending the vessel to sea, I take it to be clear that the Admiralty have jurisdiction to decide when, and in what manner, the ship shall go to sea, as well as what security shall be given. If the ship cannot go to sea without the production of the registry, it seems but reasonable that the right to retain the registry, as connected with the question of sailing, should come under the cognizance of the Court of Admiralty. Unless therefore a stronger ground is made out for our interposition, I think we ought not to grant this rule.

Rule refused.

1818.

19th Nov.

Prohibition granted to an ecclesiastical court on behalf of the plaintiff in that Court, in a suit for tithes, a *modus* having been pleaded (a).

HAYWARD *against* CULLIFORD.

CHITTY moved on behalf of the plaintiff, for a rule to shew cause why a writ of prohibition should not be issued. The plaintiff, as impropriate rector of *Midford*, in the county of *Somerset*, had libelled the defendant in the Consistorial Archidiaconal Court of *Wells*, in a suit for tithes, and the defendant had pleaded a *modus*. The peculiarity of this application was, that it was made on behalf of the plaintiff, by whom the suit in the Ecclesiastical Court was instituted. *Worsts v. Clyston* (b) was cited, which was an application on the part of the original plaintiff in the Ecclesiastical Court. If the temporal court has knowledge by any means that a spiritual jurisdiction

(a) The affidavit upon which the motion was grounded, was as follows :

“ *T. R.* of or in the county of *Somerset*, proctor for *E. H.* the party plaintiff, named and mentioned in the office copies of the libel, answer, and allegation hereunto annexed, and marked with the letters A, B, C, maketh oath and saith, that he this deponent attended on, &c. at the office of the register of the archidiaconal consistorial Court of *Wells*, and then and there examined and compared the said office copies hereto annexed with the original libel, answer, and allegation, in a certain cause in the archidiaconal consistorial court depending, wherein the said *E. H.* widow, is party agent or plaintiff, and *W. C.* the party defendant ; and this deponent further saith, that the said annexed office copies contain true copies of the said original libel, answer, and allegation : and this deponent further saith, that the said answer was exhibited to the said archidiaconal consistorial Court on or about the 7th day of *April*, &c. by *W. P.* as the proctor of the said *W. C.* and was thereupon deposited and left with the said register of the said archidiaconal consistorial Court ; and although in and by such answer a certain prescription and *modus* have been pleaded by the said *W. C.* the said *W. C.* hath been since proceeding in the said cause at the suit of the said *E. H.* : and this deponent further saith, that all matters and things in the annexed suggestions set forth and alleged on the part and behalf of the said *E. H.* are true, as this deponent verily believes, and entitled to credence in every respect. Sworn, &c.

N. B. This form is objectionable, as occasioning the expence of stamped copies of the libel, answer, and allegation, which need not be annexed or set out verbatim.

(b) *Cro. Jac.* 350.

is interfering with temporal trial, a prohibition ought to be awarded.

1818.

HAYWARD
against
CULLIFORD.

Peake, amicus curiæ, said he had applied also for a plaintiff in a similar case in the Court of Exchequer, and that the rule had been obtained.

BAYLEY J. doubted. He said that where rules of evidence in the Ecclesiastical Court are more lax than in a court of common law, to the prejudice of the party applying for a prohibition in this court, the prohibition is granted; but doubted whether it was in other cases.

The case was desired to be mentioned again; and on a subsequent day *Chitty*, in support of the rule, observed, that the defendant's plea in the Ecclesiastical Court contained an allegation of a *modus*, and not a composition, as had been originally supposed. It was clear that the *modus* could not be enquired into in the Ecclesiastical Court. *Com. Dig. Prohibition, F. 14.* He cited also *Worts v. Clyston (c)*.

The Court granted a rule *nisi*, which was afterwards made

Absolute (d).

(c) *Cro. Jac.* 351.

(d) When the defendant alleges a *modus* in answer to a suit in the Ecclesiastical Court for tithes, the Court of King's Bench will grant a prohibition, although it should not appear that the *modus* has been regularly pleaded. *French v. Trask, 10 East, 348.* In 2 *Inst.* 207, it is laid down, that if the Ecclesiastical Court will hold plea of any matter which belongs not to their jurisdiction, upon information thereof to the king's Court, either by the plaintiff, defendant, or a mere stranger, a prohibition will be issued. 2 *Roll. Ab.* 312. *Leqq.* 130. *Goulsh.* 149. *Bac. Abr.* tit. Prohibition. The reason is, that the objection is not allowed for the sake of the plaintiff, but of the Court, whose jurisdiction is invaded.

PROMISSORY NOTES.

1816.

8th Nov.

MARGESSON *against* GOBLE.

A letter from the holders of a promissory note to the defendant, the indorser, saying "the maker is not ready to pay, but will be in a week, which is time enough for us," is not giving time so as to discharge the indorser.

NOLAN moved to set aside a verdict for the plaintiff. The action was brought on a promissory note by the indorsee, and supposed *laches* of the plaintiff in giving time to the maker, were relied on at the trial, and leave was given by the Judge to move the Court. *Ellis* drew the note payable to *Goble* (the defendant), who indorsed to the plaintiff. The note was due the 5th of *August*, 1816, and was sent to defendant on the 8th *August*, dated the 23d *June*, at forty days. Plaintiff's residence was at *Arundel*, in *Sussex*, defendant's at *Sunderland*. Plaintiff wrote to the defendant as follows: "Mr. *Ellis* is unable to pay the note for a few days; he says he shall be ready in a week, which will be in time for us—only form to acquaint you." It was contended, that this was not notice, and the plaintiffs took upon themselves to know the state of the drawer's circumstances; that the plaintiffs should have given further notice, which they did not do. No notice was given till the 20th of *October*. It was of importance that a party living at such a distance should not be deceived.

* **LORD ELLENBOROUGH C. J.** The letter was notice of the default, and only gave you a statement of his circumstances, which you do not say was at all fraudulent.

BAYLEY J. This letter was sufficient to put you on the alert.

Nolan. I rely on the second point, that of giving time.

1816.

MARGESSON
against
GOBLE.

ABBOTT J. How did they give time? they did not give up their right to sue.

Nolan. He could not sue.

LORD ELLENBOROUGH C. J. How can you say that a voluntary agreement to wait, without a consideration, could prevent him from suing?

BAYLEY J. It was not a binding agreement.

LORD ELLENBOROUGH C. J. Without a consideration it is not binding in law.

Nolan said, he had begged that it might be left to the jury whether it was not a contrivance.

LORD ELLENBOROUGH C. J. There does not appear to be any contrivance. They told you all they knew.

Rule refused.

QUO WARRANTO.

6th Nov. :

THE KING *against* TRAVANNION.

The rule is absolute in the first instance for an inspection of the corporation books, where a *quo warranto* is depending (a).

LONG, on behalf of the relator in a *quo warranto* information, moved for a *mandamus*, in order to obtain an inspection of the corporation books. An information in the nature of a *quo warranto* being depending, the rule was in the first instance made

Absolute.

(a) In another case in this Term, where a rule nisi had been granted for an information in the nature of a *quo warranto*, the rule for inspection of the corporation books was also made absolute in first instance, on account of the pendency of the *quo warranto* information. Informations in the nature of *quo warranto* are now considered in the light of civil proceedings; and therefore when they are exhibited at the relation of a member of a corporation, the Court will grant a rule for the inspection of such of the corporation books as relate to the subject matter in discussion. See the *King v. Babb*, 3 T. R. 579. *The King v. Shelley*, id. 142. *Bateman v. Phillips*, 4 Taunt. 162. The motion for a rule to inspect and take a copy where an action, &c. is depending, is founded on an affidavit, stating the circumstances under which the inspection is claimed, and that it has been demanded and refused; and the Court will then grant a rule absolute in the first instance. *Roe v. Aylmar*, Barnes, 236. *Tidd*, Prac. 6th ed. 628. Where no action is depending, the proper motion is for a rule to shew cause why a *mandamus* should not issue, commanding the officer who has the custody of the books to permit the party applying to inspect and take a copy of the necessary writings. *The King v. Tower*, 4 M. & S. 162.

1818.

28th Nov.

THE KING *against* HOLT.

Under particular circumstances the Court will suffer a disclaimer to be entered without costs (b).

MARRYAT and Campbell shewed cause against a rule for an information against the defendant,

(b) The Court will not consolidate informations against several persons for distinct offences, but there must be an information against each, to enable him to disclaim. *The King v. Warlow*, 2 M. and S. 75.

in the nature of a *quo warranto*. It appeared from the affidavits that the defendant was a very young man ; that he had not acted, and had no intention of acting.

1818.

THE KING
against
HOLT.

Scarlett, in support of the rule. Notwithstanding the circumstances alleged by the defendant, it is necessary that judgment of *ouster* should be entered.

PER CURIAM. The defendant shall be at liberty to enter a disclaimer, without costs.

THE KING against PAYNE.

28th Nov.

WALFORD moved for an information in nature of a *quo warranto* against the defendant, for exercising an office in a corporation after he had resigned. The resignation was in writing, but there was no resignation by deed.

Quo warranto
against one
who acted after
he had resigned
by writing, but
without
deed (a).

ABBOTT C. J. The case of the *King* against the *Mayor of Rippon* (b) seems to have settled the point. From this case it should seem that a resignation without deed is quite sufficient. It appears too that the present defendant wishes to involve the corporation in difficulties.

Rule *Nisi*.

(a) In *Res v. Rippon*, 1 Lord Raym. 563. Salk. 433, S. C. Holt C. J. said, if a man speaks at large that he will not be alderman, &c. that signifies nothing ; but if he comes in an open assembly of the corporation and there resigns his office, and declares that he will not continue in it longer, and desires them to accept his resignation, and they accept it and elect another in his room, it is a good resignation. Indeed, if it was an office which lay in grant by deed, there ought to be a deed to surrender it ; but when they are made by election, the corporation may accept a surrender by parol. However it was held, that *resignavit* in a return to a *mandamus* might be intended a resignation by deed, if such a resignation were necessary.

(b) 1 Lord Raym. 563. Salk. 433, S. C.

1818.

9th Nov.

Quo warranto
for exercising
the office of a
justice of the
peace (a).

THE KING *against* ———

GASELEE moved for a rule *nisi*, for an information in nature of a *quo warranto* against the defendant, for exercising the office of justice of the peace of Totness.

BAYLEY J. asked, if there was any instance in which a *quo warranto* had been granted for the office of justice of the peace.

Gaselee stated, that he had before obtained a *quo warranto* for such an office. The charter makes this a corporate office. There is another office, that of receiver. The defect complained of is, that the defendant has been elected under a mayor who has been subsequently ousted. The defendant exercised the office of justice of the peace for one year after the mayoralty determined. The year has now ceased.

BAYLEY J. The rule then, it seems, will be of little service to you. The office alluded to, of receiver, is something like that of chamberlain, which is a corporate office.

The rule *nisi* was granted; and was afterwards enlarged: and on BAYLEY J. communicating with AB-

(a) The usurpation of franchises and offices in corporations, constitutes the principal ground for applications to the Court for this kind of information. By the common law such usurpations could only be punished by a prosecution at the king's suit, though the dispute were really between party and party. The stat. 9 Ann. c. 20. s. 4. gave liberty to file informations at the relation of a private person, who was made liable to costs if there was judgment for defendant; and they must be filed by leave of the Court. See 5 T. R. 379; and *Schwyn's Nisi Prius*, 4th ed. tit. *Quo Warranto*. The Court will make the rule for a *quo warranto* information absolute, though the party has since the rule resigned his office, and the resignation has been accepted. 2 M. and S. 75.

BOTT C. J. and HOLROYD J. on their coming into Court.

1818.

THE KING
against

ABBOTT C. J. said, that upon conferring upon the point, but without expressing a very decided opinion, the Court would grant a

Rule *Nisi*.

THE KING *against* PAYNE, ESQ.

1818.

6th Nov.

THIS was an application for leave to file an information in the nature of a *quo warranto* against the defendant, for exercising the office of alderman, without having been duly elected. The aldermen were to be elected from the capital burgesses. The defendant had not been duly elected a capital burgess, and therefore, it was contended, could not be properly elected alderman. There was not a sufficient number of electors present when the defendant was chosen a capital burgess.

Where the relator, on an application for a *quo warranto* information, is the legal adviser of the defendant, and has advised him that he was duly elected, the Court will discharge the rule for the *quo warranto* (a).

THE COURT in the first instance granted a rule *nisi*; but afterwards, on an affidavit being filed, that the relator had been the legal adviser of Mr. *Payne*, and since he had exercised the office of alderman had repeatedly advised him that he had been duly elected, the rule was

Discharged.

(a) At common law, informations in the nature of *quo warranto* could only be filed by the crown, and through the medium of the Attorney-General. The disputes, however, which gave rise to these informations, being in general such as only affect individuals (see the *King v. Francis*, 2 T. R. 484), it was enacted by the 9 Ann. c. 20. s. 4. that the proper officer of the Court might, with the leave of the Court, exhibit *quo warranto* informations at the relation of any person desiring to prosecute the same, and who should be mentioned in the information to be the relator. The Court will not stay proceedings until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator and no fraud is suggested. *Rex v. Wympe*, 2 M. and S. 346.

1815.

11th Feb.

Retail baker is not ineligible as mayor, though the officers of the borough settle the assize of bread there.

REX against DEANE.

RICHARDSON moved for a *quo warranto* information against a party who had been appointed mayor of *Norwich*, the mayor of which place settles the assize of bread; and *Deane* was when appointed, and still continues to be, a retail baker.

ELLENBOROUGH C. J. When he took the office he was under no incapacity; he might have given up his his trade. If he abuses his office, it may be a cause of removing him; but the original appointment was good.

Rule refused. *

1817.

26th Nov.

REX against DR. MARSHALL.

Party admitted to defend the defendant's title. It is no objection to *quo warranto*, that it is a friendly proceeding, in order that the party might disclaim.

SCARLETT and *Moore* shewed cause against a rule of *Marryat*, why certain persons should not be permitted to come in and defend the title of Dr. *Marshall* to his office of recorder, contending, that the application for the *quo warranto* was collusive, in order that Dr. *Marshall* might disclaim.

Marryat and *Gaselee*, *contra*. The incompatibility of the office of recorder, and master and counsellor, seemed to be admitted on both sides. The then and former mayor and the recorder are justices, and the mayor is sworn in before the recorder; and the number of the persons from whom the mayor is to be elected is therefore lessened by the recorder being also master and counsellor, for he is then liable to be mayor, and if he was mayor and recorder, he could not swear himself in. It was said, he might be sworn in before his deputy; *sed dub*. because his presence would supersede his deputy.

THE COURT decidedly thought there was no objection to the *quo warranto* on the ground that it was a friendly proceeding, because it may be the only mode of a party who is in office to disclaim. He cannot resign, for they may not accept his resignation; and he cannot disclaim in *vacuo*. There must be some proceeding in which he must disclaim. Eventually *Marryat's* rule was made absolute, Dr. Marshall undertaking not to disclaim the office of recorder, and to try immediately; and if found entitled to the office, to disclaim as master and counsellor.

1817.

REX
against
Dr. MARSHALL.

• REX against LAWRENCE and another.

1818.

23d May.

GASELEE moved for two several *quo warrantos* against Mr. Lawrence, as capital burgess of Camelford, in Cornwall, and another as mayor. Mr. Lawrence had, since he was elected capital burgess, accepted the office of town clerk. He contended it was incompatible.

Rule nisi granted for a *quo warranto*, where continuing incompatibility, though both offices held more than 6 years.

ABBOTT J. When did he take the office of town clerk?

Gaselee. In 1812.

ABBOTT J. More than six years ago.

Gaselee. But there is a continuing incompatibility; he states he acts as town clerk.

Rule nisi, afterwards absolute.

RULES.

1814.

23d June.

A rule at the end of the Term may, by special leave of the Court, be drawn up for three days (a).

ANONYMOUS.

DENMAN moved, on an inclosure act, for leave to enter a feigned issue, an exorbitant compensation to a tenant for a lease vacated under the act having been awarded, and the propriety of which it was necessary to try. There not being four days to the end of the term, Denman prayed that the rule might nevertheless be drawn up to shew cause, on Tuesday the last day of term.

PER CURIAM. You may draw it up to shew cause on Monday.

(a) In general there must be four days on a rule to shew cause. *Tidd*, 7th ed. 526.

1814.

27th June.

Rule for a *concilium* obtained on Saturday, and served on the Saturday night, the Term ending on the Wednesday following, is sufficient; four days are not in all cases necessary at the end of the Term (b).

BRADSHAW against ———.

ABBOTT moved to set aside the service of a rule for a *concilium* obtained on the Saturday, and served on the Saturday night, the term ending on the Wednesday following; and he contended that this was too short notice.

LE BLANC J. Wednesday being the last day of term, four days are not necessary in a rule of this nature.

(b) See *Tidd*, 7th ed. 527.

1815.

11th Jan.

Rule obtained on Saturday for Monday, enlarged of course.

HAINES against ALDRIT.

BAYLEY, R. moved to enlarge this rule which was obtained on Saturday last, and was about to state the fact; but

THE COURT said, that as it was only obtained on Saturday, that was sufficient ground for it to be enlarged, this not being a rule for a *concilium* in case of a demurrer for delay, nor a mere motion of course.

Rule enlarged.

RULES IN KING'S BENCH.

*Monday next after Three Weeks of the Holy Trinity,
in the Fifty-eighth Year of King George the Third.*

King's Bench Prison. } **W**HEREAS for the better government

and preservation of good order in the King's Bench Prison, it is expedient to extend the rule made the 19th day of May, 1760, by this Court to the case hereafter mentioned, It is therefore ordered, that from and after the last day of this term, if any prisoner or prisoners in custody of the marshal of the said prison shall, without the leave of the said marshal for that purpose first had and obtained, keep or have any spirituous liquors in the said prison, it shall be lawful for the marshal of the said prison to remove such prisoner or prisoners so offending, or any of them, to the goal for the county of Surrey, in the Borough of Southwark, or to the prison of the Marshalsea there, or to the Bridewell within the said Borough, at the discretion of the said marshal, for such time as the said marshal shall adjudge and think adequate to the offence or offences for which such prisoner or prisoners shall be so removed as aforesaid, not exceeding the space of one calendar month for the first offence; and if any of the said prisoners shall offend a second time, that then it shall and may be lawful for the said marshal to remove such prisoner or prisoners so offending, or any of them, to any of the abovementioned prisons, at the discretion of the said marshal, for such time as the said marshal shall adjudge and think adequate for the same offence or offences, not exceeding the space of three calendar months; and that this rule, together with the former rules and orders of this Court made for the government of the said prison, be fixed up in the most public place thereof, for the use and inspection of the prisoners therein.

To prevent the use of spirituous liquors in the King's Bench prison, and empowering the marshal to remove offenders therein to another prison, to be confined there for as long as marshal shall think fit, not exceeding three months.

MICHAELMAS, 50th GEO. III.

IT is ordered, that from and after the last day of this present term, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not

To prevent the setting aside a regular attachment against sheriff,

for not bringing in the body, or the staying proceeding on bail bond, without affidavit of merits, or affidavit that application is really made on behalf of sheriff, &c.

bringing in the body, or for staying proceedings* regularly commenced on the assignment of any bail bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded upon an affidavit of merits, or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded upon an affidavit shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, (as the case may be) at his or their own expence, and for his or their indemnity only, and without collusion with the original defendant.

By the Court.

HILARY TERM, 59 GEO. III.

To discharge rule of Court, Hilary Term, 57 Geo. 3, as to ordering master of Crown Office to visit King's Bench prison, and orders that all complaints of prisoners within the said prison must be delivered to marshal or his officer.

WHEREAS it appears that the effect of so much of the rule of this Court of Hilary Term, 57 Geo. III. as directs, that the master of the Crown Office do from time to time, as well in vacation as in term time, visit the King's Bench prison, and do the several acts required of him by the said rule in that behalf, may be obtained more fully and satisfactorily if such visitations of the prison should be held under orders made from time to time by this Court in term time, or by one of the judges of the Court in vacation; It is hereby ordered, that so much of the said rule as orders that the master of the Crown Office do from time to time, as well in vacation as in term time, visit the King's Bench prison, and do the several other acts required of him by the said rule in that behalf, be, and it is hereby discharged. And it is hereby ordered, that if any petition verified by affidavit, complaining of any grievance within the said prison, shall be delivered by any prisoner to the marshal or any of his officers for the purpose of being presented to the Court in term time, or to one of the judges thereof in vacation, the marshal, or such officer to whom the same shall be delivered, shall forthwith present the same accordingly, and without fee or reward to any person whatsoever directly or indirectly in that behalf.

By the Court.

TRINITY TERM, 59th GEO. III.

Order that notices for justifying bail in person must be

IT is ordered, that from and after the last day of this term, every notice for justifying bail in person, shall be

served before eleven o'clock in the forenoon of the day on which according to the present practice such notice ought to be served, except in case of an order of the Court for further time, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served.

By the Court.

MICHAELMAS TERM, 1820.

WHEREAS by the common consent rule in ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only; and whereas in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof, have caused such plaintiffs to be nonsuited; and whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained for the defendant's insisting upon the title only, it is therefore ordered, that from henceforth, in every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case, to be taxed.

By the Court.

EASTER TERM, 1821.

IT is ordered, that in all country ejectments which hereafter shall be served before the essoign day of any

served before eleven o'clock of forenoon of the day on which notice ought to be served, except where further time to justify has been allowed, in which case notice must be served before three o'clock in the afternoon of such day.

Order, that defendant in ejectment shall specify in consent rule, the premises for which he defends, and consent that on trial he will admit the possession of the premises.

Order, that in country ejectments served

before essoign days of Easter or Michaelmas term, tenant must appear within four days after end of such term.

Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity terms respectively following.

By the Court.

EASTER TERM, 1821.

Order, that in rule nisi for setting aside award, objections to award, &c. must be stated.

IT is ordered, that in future where a rule to shew cause is obtained in this Court to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

By the Court.

HILARY TERM, 1822.

Order that if two or more notices of bail have been given, before bail appear to justify, costs thereof must be paid before justification.

IT is ordered, that from and after the last day of this term, whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed; and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

By the Court.

HILARY TERM, 1822.

Order that no officer under marshal shall take fee for enquiry into solvency, &c. of a party intending to take the benefit of rules.

IT is ordered, that from henceforth, no clerk, turnkey, officer, or other person employed by or under the marshal, shall receive or take, except from the marshal, any fee, gratuity, or reward, for or in respect of making enquiry into the sufficiency of any person or persons proposed or intended to give security upon the granting of the rules of the King's Bench prison, or otherwise, in respect of the granting of said rules. And that the marshal do dismiss any person who shall offend herein: And it is further ordered, that a copy

of this rule be kept hung up in the said prison in the place where the table of fees is hung up.

By the Court.

HILARY TERM, 1822.

IN order to prevent the fraudulent issuing of any writ of execution without a judgment to support it, It is ordered, that the sealer of the writs of this Court, shall not seal any writ of *feri facias*, or *capias ad satisfaciendum*, without having the judgment paper, *postea*, or inquisition, produced to him: And it is further ordered, that the attorney concerned for the plaintiff in the cause, or his agent, shall upon all bailable mesne process, and every writ of attachment, and *feri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, (or such other description of him as such attorney or agent may be able to give). And It is also ordered, that no judgment be signed upon any *cognovit*, without such *cognovit* being first produced to the clerk of the dockets, and after taxation of the costs, filed with him.

By the Court.

Order, that sealer of writs shall not seal a *fi. fa.* or *ca. sa.* without judgment paper, &c. be produced to him.

That attorney must on all bailable process, writ of attachment *fi. fa.* and *ca. sa.*, indorse defendant's place of abode, &c.

That to sign judgment on *cognovit*, *cognovit* must be produced to clerk of dockets, and filed with him.

EASTER TERM, 1822.

TO prevent unnecessary expence to plaintiffs suing in this Court, in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of insolvent debtors, It is ordered, that after such notice given to any plaintiff, no prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf by this Court, or one of the judges thereof.

And it is further ordered, That a copy of this rule shall be hung up in the King's Bench prison, in the place where rules of this Court are usually hung up.

By the Court.

Order, that no prisoner intending to take benefit of Insolvent Act, shall be superseded by plaintiff discontinuing to proceed in action.

RULES IN COMMON PLEAS.

REGULA GENERALIS, 1810.

Order, that in bailable causes for 1000*l.* and upwards, bail may justify in 1000*l.* beyond sum sworn to.

IT is ordered, that from henceforth, in bailable cases for any sum exceeding one thousand pounds, it shall be sufficient for the bail to justify in one thousand pounds beyond the sum sworn to.

REGULA GENERALIS, 1811.

Order, that bail must justify at sitting of the Court only, except (under circumstances) on the last day of term.

IT is ordered, that from henceforth bail in this Court shall justify at the sitting of the Court only, and at no other time, except on the last day of term, when bail who have been prevented from attending at the sitting of the Court, shall be permitted to justify at the rising of the Court.

REGULA GENERALIS, 1812.

Order, that fines must be left at Chirographer's office, fourteen days after passed, and all fines in King's Silver office must be carried to Chirographer's office.

WEDNESDAY, June 17th. It is ordered, that from henceforth all fines shall be left at the office of the Chirographer, within fourteen days after the same shall have passed the King's Silver office, and that all fines now remaining in the King's Silver office shall be carried to the Chirographer's office within two months from this day; and that a neglect to comply with this rule shall be deemed a contempt of this Court.

TRINITY TERM, 1812.

Order, that rules for special juries must be served, and cause marked in marshal's book as special jury, two days before adjournment day, in London or *Middlesex*.

IT is ordered, That in future no cause shall be tried by a special jury in this Court, in *Middlesex*, or *London*, unless the rule for such special jury shall be served, and the cause marked in the marshal's book as a special jury cause, two days previous to the adjournment day, in *Middlesex* or *London*, respectively.

J. MANSFIELD.
J. HEATH.
A. CHAMBER.
V. GIBBS.

TRINITY TERM, 1814.

It is ordered, that from and after the last day of this present *Trinity* Term, the seal office shall be open from eleven in the morning till two in the afternoon, and from five to seven in the evening during Term, and for ten days after every issuable Term, and one week after every other Term; and from eleven in the morning till three in the afternoon at all other times.

Order, that sea office be open from eleven till two, and from five till seven, during Term, and ten days after issuable Term; and one week after any other; and from eleven till three in vacation.

V. GIBBS.
J. HEATH.
A. CHAMBRE.
R. DALLAS.

REGULA GENERALIS.—EASTER TERM, 1817.

IT is ordered, that hereafter all rules and orders for *superseas* to discharge defendants out of the custody of the Warden of the Fleet, or other custody, shall be filed with the Prothonotaries of the Court, upon their signing the writ of *supersedeas*.

Order, that rule for *supersedeas* of defendant out of custody of warden, &c. must be filed upon signing *supersedeas*.

HILARY TERM, 1820.

IT is ordered by the Court, that from and after the last day of this present Term, no motion shall be made at the bar on the last day of any Term touching the amendment of any fine or recovery, or any of the proceedings therein.

Order, that no motion relating to a fine or recovery shall be made on last day of Term.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

HILARY TERM, 1821.

WHEREAS by the common consent rule, in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only. And whereas, in many instances of late years, the defendant in ejectment has put the plaintiff after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was

Order, that defendant in ejectment shall specify in consent rule premises for which he defends, and consent that on trial he will admit the posses-

sion of premises.

See same rule in King's Bench, *ante*. 375.

brought) of the premises mentioned in the ejectment, and for want of such proof has caused such plaintiff to be nonsuited. And whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained, for the defendant's insisting upon the title only : It is therefore ordered, that from henceforth, in every action of ejectment the defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration in the possession of such premises ; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case, to be taxed.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

EASTER TERM, 1821.

Order, that in country ejectments, served before essoign days of *Easter* or *Michaelmas* terms, tenant must appear within four days after end of such terms.

See same rule in King's Bench, *ante*, 375.

IT is ordered, that in all country ejectments which hereafter shall be served before the essoign day, either of *Michaelmas* or *Easter* Term, the time for the appearance of the tenant in possession, shall be within four days after the end of such *Michaelmas* or *Easter* Term, and shall not be postponed till the fourth day after the end of *Hilary* or *Trinity* Term next respectively following.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

REGULA GENERALIS, 1819.

Order, that affidavit in motion to enter up judgment on old warrant, must state that

THE Court, on a motion by *Lens*, Serjeant, on a former day (*June 22d*), to enter up judgment on an old warrant of attorney, on affidavit that defendant was alive within nineteen days (which took the time back before the commencement

of the Term), refused the rule, and made a general rule that the affidavit must in future state the defendant to be alive at a day within the Term on which the motion should be made.

defendant is alive on a day in the term.

HILARY TERM, 35 GEO. III.

IT is ordered, That upon all process sued out of this Court, returnable the last return of any Term, if the plaintiff declares in *London* or *Middlesex*, and the defendant lives within twenty miles of *London*, the defendant shall plead within four days after such declaration, filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on the day of such return, or on the day next after such return, in case the same shall not happen on a *Sunday*, in which case the plaintiff shall have the whole of the day following to file or deliver such declaration as aforesaid; and in case the plaintiff declares in any other county, or the defendant lives above twenty miles from *London*, the defendant shall plead within eight days after the declaration filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered as aforesaid. And it is further ordered, that the rules now in force respecting the times of declaring and pleading upon any process returnable the first, second, or third return of any Term shall also extend to the fourth return of *Easter* Term.

Enabling plaintiff to declare in C. P. on process returnable last return of the term, so as to have a plea of the term (a).

By the Court.

RULES IN EXCHEQUER.

WEDNESDAY, 15th MAY, 1816.

THE Court ordered, That from this day the justification of bail in open Court should be taken at the sitting of the Court, before the other ordinary business.

Order, that justification of bail must be at sitting of the Court, before other business.

(a) The only copy of the rule in possession of the secondaries, which is in MS. and bears only a copy of the judge's signature, does not agree verbatim with the rule given in *Henry Blackstone*, though it is in substance the same. The rule, as given by *Peacock*, varies from both of the above in several particulars of less consequence, but principally in omitting the word "not" before "happen," in the 16th line, which has the effect, in every case to which this rule applies, of allowing the plaintiff one day less to declare in. The words of the rule, as inserted in a book belonging to Mr. Secondary *Griffith*, are as above.

25th JUNE, 1817.

Order, that all motions in causes to be heard before Lord Chief Baron, must be made before him alone, when sitting in Court.

SHADWELL rose to make a motion in full Court, in a matter which was pending before the Lord Chief Baron in the exercise of the sole jurisdiction committed to his Lordship under the recent act of parliament; when the Court intimated (not as a matter of regulation, but as the natural course of practice in such case, to prevent a clashing of jurisdictions), that all motions in causes to be heard by his Lordship must be made before him alone, when sitting in the other Court.

The following Notice was published in the Court, 28th April, 1817. Sittings of the Court of Exchequer in Term — In the Exchequer Chamber.

Order, regulating the hearing of causes, petitions, &c.

Mondays, Tuesdays, Wednesdays, Thursdays. } THE Lord Chief Baron will hear causes and matters by petition on these days, except either of them shall happen to be the first or last day of Term. All causes for further directions are to be brought on at the sittings of the Court on *Thursdays* only.

Fridays, Saturdays. } THE Lord Chief Baron will hear causes on these days, after the revenue business in the outer Court is disposed of, if there be time.

IN THE OUTER COURT.

Regulating hearing of exceptions, pleas, &c. in equity and law.

Mondays, Tuesdays. } THE Court will hear exceptions, pleas, and demurrers, in injunction causes and motions in equity and common law.

Wednesdays. THE Court will hear exceptions, pleas, and demurrers, in causes not being injunction causes, on these days only. The Court will also hear on these days exceptions, pleas, and demurrers in injunction causes and motions in equity and common law.

Thursdays.—THE Court will hear exceptions, pleas, and demurrers in injunction causes, and motions in equity and common law.

Fridays, } **THE** Lord Chief Baron will sit with the rest
Saturdays. } of the Court, to hear motions in revenue mat-
 ters. After such motions are over, the Lord Chief Baron
 will adjourn to the Exchequer Chamber, to hear causes and
 petitions ; and the rest of the Court will continue to sit, to
 hear other matters.

All applications for transfer of stock, or payment of mo-
 ney out of Court, where decrees have been made, are to be
 by way of petition, similar to the practice in Chancery.

29th April.

The Lord Chief Baron sat apart from the rest of the
 Court in the Exchequer Chamber this day, for the first time,
 under the late act of parliament.

MEMORANDUM. MONDAY, 27th APRIL, 1818.

ON its being proposed to the Court to take for argument
 exceptions which had been filed to an answer, they re-
 fused to hear them ; intimating a desire that their rule,—
 that exceptions must be heard at the sitting of the Court, be-
 fore the motion,—should receive publicity, on account of its
 convenience to the bar and the suitors, and preserving order
 in the routine of the ordinary business of the day.

Exceptions
 must be heard
 at sitting of the
 Court, before
 motions.

SCIRE FACIAS.

1817.

1st May.

RUTLAND *against* NEWNHAM.

A *scire facias* is necessary where an *elegit* is not awarded within a year and a day after judgment obtained.

THE plaintiff obtained judgment against the defendant, but no execution was taken out within a year and a day after the judgment was obtained. The plaintiff did not sue out a *sci. fa.*, but awarded an *elegit* on the roll, continuing it down by *vicomes non misit breve*, and then issued and executed an *elegit*.

Richardson on a former day obtained a rule to shew cause why the writ of *elegit*, and the proceedings thereon, should not be set aside for irregularity, on the ground that the plaintiff had not sued out a *sci. fa.*

Marryat now shewed cause, and said that the only question was whether a *sci. fa.* is necessary, where an *elegit* is not sued out within a year and a day after the judgment. [LORD ELLENBOROUGH C. J. If a *sci. fa.* is ever necessary, why not have the principle the same in all cases; for the judgment may have been satisfied, and the award must be within the year after judgment.] *Marryat*. The practice is otherwise. The case of *Seymour v. Grenville, Carth.* 283. was under similar circumstances, and the Court there gave their opinion in favour of the established practice; and Mr. *Tidd* says the same.

LORD ELLENBOROUGH C. J. I see nothing to distinguish this from the general cases; the principle is just the same.

BAYLEY J. The evil to be prevented is the same.

1817.

LORD ELLENBOROUGH C. J. The rule must be made absolute, unless the Court should see any reason during the Term to alter their judgment; for the practice is said to be otherwise.

RUTLAND
against
NEWNHAM.

Rule absolute.

SESSIONS.

THE KING *against* THE JUSTICES of ESSEX.

1820.

4th Feb.

KNOX moved for a rule to shew cause why a *mandamus* should not issue to the justices of *Essex* sitting in quarter sessions, commanding them to hear and determine an appeal touching the settlement of a pauper, on the alleged ground that they had refused to hear the case, after due notice of the appeal had been served upon the respondent parish. The case was this: The order of removal was served by the Respondents upon the Appellants, two days previously to the last *Michaelmas* sessions, when the latter gave the former notice that they should move to enter and respite their appeal at the then ensuing sessions, until *Epiphany* sessions, when they informed them that they would be ready to try their appeal with effect. Accordingly at *Michaelmas* sessions the appeal was entered and respited, with the consent of the respondent parish, until the last *Epiphany* sessions. In the mean time a negotiation had been entered into between the two parishes, for the purpose of adjusting on which the pauper should be settled: but no amicable arrangement having taken place, the appellants attended at the last *Epiphany* sessions for the

This Court will not interfere with the practice of the Court of Quarter Sessions, unless it appears to be manifestly wrong or unjust.

Where an appellant parish gave notice before *Michaelmas* Sessions that they would at these Sessions enter and respite, and try their appeal with effect at the following Sessions; and in the mean time a negotiation had taken place with the respondents as to the settlement of the pauper, but without any determination; it was held to be necessary to give a fresh no-

1820.

THE KING
against
THE JUSTICES
OF ESSEX.

tice of appeal
 for the follow-
 ing Sessions, to
 entitle the ap-
 pellants to be
 heard.

purpose of trying their appeal, pursuant to the notice given prior to *Michaelmas* sessions; but it appearing that the appellants had not given a fresh eight days notice of their intention to try at those sessions, the Court refused to entertain the appeal, and confirmed the order. It was now contended that such fresh notice was not necessary, inasmuch as there had been a previous notice served upon the respondents; which, after the negotiation alluded to respecting the settlement of the pauper, dispensed with the necessity of giving fresh notice, and consequently that the objection taken at the *Epiphany* sessions to the want of such notice, was in breach of good faith.

PER CURIAM. The sessions are the judges of their own practice; and before we can interfere to regulate that practice, it must be shewn that it is extremely wrong, or unjust. It appears to us that the sessions in this case have been perfectly right in their determination, because the appellants were bound to give the usual notice to the respondents, prior to the sessions at which they really meant to try their appeal. This was not done; and we do not think that the notice before *Michaelmas* sessions, or the subsequent negotiation, dispensed with the necessity of such notice.

Rule refused.

SET-OFF.

JARVIS *against* CHAPPLE.

1815.

17th April.

CLARKE moved to set aside a nonsuit; this was an action by the plaintiff, an auctioneer, for the price of goods, and the defendant pleaded specially that the plaintiff sold, as auctioneer for *Tappinger*, who was indebted to defendant in a sum which he set off; plaintiff replied that they were not the goods of the principal, and not sold or delivered by the plaintiff, as agent for the principal, on which issue was joined. *Clarke* contended that the plaintiff, as an auctioneer, could bring an action, and not be defeated by a set-off of a debt of the principal to the seller.

The plaintiff being an auctioneer, and suing for the price of goods sold by him as such, the defendant may set off a debt due to him from the principal vendor (a).

BAYLEY J. The goods were sold before *Tappinger's* house; and the defendant being about to take them away, and the plaintiff objecting to it till paid for, the defendant said he would see *Tappinger* about it, and then the plaintiff let him take it away.

LORD ELLENBOROUGH C. J. If the auctioneer sold them as his own goods, or had a lien on them, the set-off would not defeat his action. But after an intimation to him of the principal's debt, and the conversation above, he must be subject to the set-off of the debt of the principal.

Rule refused.

(a) See *George v. Claggett*, 7 Term. Rep. 359.

1817.

15th June.

OLDERSHAW *against* THOMPSON.

In an action of covenant, the defendant must plead a set-off, and having pleaded *non est factum*, and given notice of set-off, cannot avail himself of it (a).

SCARLETT moved for a new trial on the part of the defendant, where the verdict had been given for the plaintiff. The action was in covenant, for the payment of an annuity. Defendant pleaded *non est factum*, and gave a notice of set-off.

LORD ELLENBOROUGH C. J. The only question is, whether, on the plea of *non est factum* a notice of set-off can be gone into.

Scarlett mentioned the statute 2 Geo. 2. c. 22. s. 13.

BAYLEY J. *Non est factum* does not put the whole declaration in issue, and is not a “general issue” within the meaning of the statute.

PER CURIAM.

Rule refused.

(a) See this case at *Nisi Prius*, 1 *Stark*: 311. *Chitty* on Pl. 1 vol. 561. 3d ed.

SHERIFF.

ANONYMOUS.

1817.

13th May.

ADAMS moved for leave to amend a rule for an attachment against the sheriff of *Northamptonshire*, or for an attachment against the under-sheriff for not bringing in the body, the sheriff having died pending his year of office. He moved this on the 3 *Geo. 1. c. 15. s. 8.* which makes in such an event the under-sheriff responsible for the discharge of his office.

Rule for an attachment against an under-sheriff, on the death of the sheriff during his year, under 3 *Geo. 1. c. 15. s. 8.* is not absolute in the first instance (a).

LORD ELLENBOROUGH C. J. seemed to doubt whether the act had any retrospective application, and whether therefore it would apply to any thing which took place before the death of the sheriff.

Adams, in answer to this, observed that no rule to bring in the body had been served on the late sheriff;

(a) By the statute 3 *Geo. 1. c. 15. s. 8.* it is enacted, “that if any sheriff of any county of *England* or *Wales* shall happen to die before the expiration or determination of his year, or before he be lawfully superseded, in such case the under-sheriff, or deputy-sheriff by him appointed, shall nevertheless continue in his office, and shall execute the same and all things belonging thereto in the name of the deceased sheriff, until another sheriff be appointed for the said county, and sworn as directed; and the said deputy-sheriff or under-sheriff shall be answerable for the execution of the said office in all things, and to all respects, intents, and purposes whatsoever, during such interval, as the high-sheriff so deceased would by law have been if he had been living; and the security given to the high sheriff so deceased by the said under-sheriff, and his pledges, shall stand, remain, and be a security to the king, his heirs and successors, and to all persons whatsoever, for such under-sheriff’s due performance of his office during such interval.”

1817.

ANONYMOUS.

that it had been applied for and obtained before his death, but before the service thereof he died; and thereupon, after his death, it was served on the under-sheriff, who returned *cepi corpus*.

LORD ELLENBOROUGH C. J. granted a rule *Nisi*.

Adams intimated that it was usually a rule absolute in the first instance.

LORD ELLENBOROUGH C. J. In a case like this, under the statute by which a new liability is cast upon the under-sheriff, depending in a great degree on the facts, it should be a rule *nisi* only.

1815.

26th May.

ANONYMOUS.

Attachment refused against the sheriff for not selling under a *venditionem exponas*, where he had returned he could not sell for want of buyers.

KNOX moved for an attachment against the sheriff for not selling under a *venditionem exponas*; contending, that as the sheriff had returned that he had seized goods sufficient to cover the debt, and had only sold part, for want of buyers, he was liable to this proceeding, admitting that he had not done his duty; and he mentioned the case of *Cameron v. Reynolds, coram Lord Mansfield*.

DAMPIER J. said he believed there were cases in which attachments against the sheriff had been refused, where crops had been taken and not sold.

Knor said that case was mentioned in the one above, and overruled there.

DAMPIER J. said that must be taken with respect to the subject matter, and an attachment will not be granted unless you can shew by affidavit that the sheriff is trifling with the Court.

Knox said that this was the only remedy.

1815.

ANONYMOUS.

DAMPIER J. said he thought he might have a second *venditionem exponas* to sell the goods which remained unsold.

Rule refused.

ANONYMOUS.

1814.

25th June

AN action was brought against three defendants, two of whom were arrested, and put in bail, and the plaintiffs took an assignment of the bail bonds; and as to the third, the sheriff returned *non est inventus*; the plaintiff not being satisfied with this, ruled the sheriff to bring in the body; and now

Where there were three defendants, two of whom were arrested and bailed, and the plaintiff took an assignment of the bail-bonds, and as to the third, the sheriff returned *non est inventus*, under these circumstances the Court discharged the rule to bring in the body.

Abbott moved to discharge the rule.

PER CURIAM. The rule must be discharged, because as to two defendants, the plaintiff has discharged the sheriff by taking an assignment of the bail-bonds; and as to the other, the body cannot be brought in.

Rule to bring in the body discharged.

SETTING ASIDE AND STAYING PROCEEDINGS.

1815.

——— q. t. *against* SMITH.

1st June.

The consent of the party to whom the moiety of a penalty is to be paid, he not being the plaintiff, is not necessary in prosecuting a *qui tam* action.

MARRYAT shewed cause against a rule of the Attorney-General, to stay proceedings in this *qui tam* action, which was founded upon the *Strand* Bridge Act, which gave an action against any director becoming a contractor for any thing for the bridge, and gave the penalty to the informer, and the proprietors of the *Strand* Bridge.

The Attorney-General's objection was, that the proprietors of the *Strand* Bridge did not consent to this action, and that by making them plaintiffs, they were, contrary to their consent, subjected to a responsibility for costs. But upon reference to the *precipe* upon which the Attorney-General relied, it appeared to be only in the usual form, and which directs the defendant to render to the plaintiff and the proprietors the penalty; but this does not make them plaintiffs, and it must be so.

HOLROYD J. They are not liable to costs.

Rule discharged.

1815.

ANONYMOUS.

19th April.

The Court will not prevent the plaintiff from proceeding at the same time by action for a false return, and a *distringas* to make a return

GIFFORD moved to stay proceedings either in the action for the false return, or on the *distringas* against the late sheriff, for a return, the plaintiff having proceeded by both remedies.

BAYLEY J. granted the rule ; but, as *Gaselee* suggested, that it was the last day for the return of the *distringas*, he said there must not be a stay of proceedings ; however, the Court granted a rule *nisi* ; and now

1815.

ANONYMOUS.

Gaselee shewed cause against the rule being made absolute ; and

LORD ELLENBOROUGH C. J. asked the other side if they would bring the money into Court ; if not, they would permit them to pursue every remedy they have to procure justice.

Scarlett and *Gifford*, *contra*, stated that there was a *distringas* against the late sheriff, and an action besides.

DAMPIER J. We must studiously avoid information if we did not see that there has been a collusion between the defendant and the sheriff.

Gifford. The sheriff could not sell.

BAYLEY J. There you are under a mistake ; the *venditio exponas* is only to compel him to sell ; but he may sell without it if he likes.

PER CURIAM. The plaintiff is entitled to both remedies ; and under the circumstances, we will not deprive him of either.

Rule discharged, with costs.

1816.

7th May.

An action may be brought in a superior court, when the demand is above 40s. though it be reduced by a set-off.

GOBED *against* BIRT.

WHITRED moved to set aside a verdict for the plaintiff. The action was brought on an *indebitatus assumpsit* for 58*l.*, and defendant pleaded a set-off; he referred to 18 *Eliz.* for the recovery of debts in the isle of *Ely*. The plaintiff and defendant resided within the isle of *Ely*, and the plaintiff was precluded from suing in any other Court; *Parkes v. Eldridge*, 1 *East*, 353. The set-off reduced the demand to 12*s.* 6*d.*

BAYLEY J. This is not within the words of the act; it was not commenced for a less sum than 40*s.* The plaintiff's demand was, without the set-off, more than 40*s.* If he had sued in the inferior court he would have been told his demand was too great, and now you tell him it is too little.

LORD ELLENBOROUGH C. J. You would have the plaintiff in a very hard situation. If he had sued for his full demand in the inferior court, you would say nothing of your set-off, and turn him round, because it was deemed too great; and here you say it is too little, availing yourself of the set-off.

Whitred. The debt, as far as the set-off goes, is destroyed.

ABBOTT J. It is not destroyed; one debt is a set-off against the other. The statute giving the set-off says expressly, that one debt may be set off against the other.

HOLROYD J. I am of the same opinion.

BAYLEY J. If the debt was, as you contend, de-

stroyed, it might be given in evidence on the general issue, which cannot be ; it must either be pleaded, or a notice of set-off be given.

Rule refused.

CULLIFORD against DYCHE.

1815.

10th June.

R. BAILEY shewed cause against a rule of *A. Moore*, to set aside proceedings for irregularity ; on an affidavit that the debt was less than 40s. and the parties resided within the jurisdiction of the county court of *Somerset*. The Court of King's Bench will not stay proceedings merely on an affidavit that the debt was under 40s.

DAMPIER J. said the Court never attends to such a suggestion, unless the facts appear on the declaration, or particulars of plaintiff's demand, and not where they are merely shewn by affidavit ; and that the Court would not, on such a motion as this, decide the merits. In this case the affidavits stated the debts on both sides.

Rule discharged, without costs (a).

(a) But see 4 T. R. 495. 5 T. R. 64. *White v. Griffiths*, 35 Geo. 3 ; and *Tidd*, 7th ed. 537. 2 *Price's Rep.* c, contra.

ANONYMOUS.

1815.

13th Feb.

PEAKE shewed cause against a rule obtained by *Starkie*, to set aside proceedings in action brought in *Middlesex* for less than 40s. against the defendant, who resided in *Caernarvon*, for goods delivered to him there, on the ground that proceedings should have been in the inferior court ; he relied on *Handwood v. Leester*, 2 Bos. and Pul. 617. and mentioned other cases, and observed, that if this application can be supported, action by late act cannot be brought under 10/. Action may be brought in Court of Grand Sessions in *Wales* for goods delivered to a carrier in *London*, but received in *Caernarvon* ; and proceedings in action in *Middlesex* stayed, cause of action being under 40s.

1815.

ANONYMOUS.

Starkie, contra, said the affidavit was not sufficient, for it did not negative delivery of goods to the defendant at *Caernarvon*, it only swore that they were delivered to the carrier in *London*.

LE BLANC J. This is not sufficient; the goods might still be delivered at *Caernarvon*; and if so, the action might be brought there.

Rule absolute.

1816.

3d July.

NABB *against* ———.

The Court will stay proceedings if a defendant be sued by bill as an attorney, when he is not one.

WILLIAMS J. shewed cause against a rule of *Campbell*, to stay proceedings; on an affidavit that the defendant was sued by bill as an attorney, when he was not so.

LORD ELLENBOROUGH C. J. He should have pleaded it in abatement; as if he had been sued as a peer, if he was not so.

Campbell said that there were no precedents of any such plea, and was about to refer to a MS. case, *Barthwaite v. Couper*, when

LORD ELLENBOROUGH C. J. said, upon second thoughts, he considered that, as the plaintiff had, by his own act and allegation, averred that the party was an attorney, and proceeded without any process, when the party was not an attorney, the rule must be

Absolute.

SHIPS AND SHIP-OWNERS.

SHIRWELL *against* SHAPLOCK *and others.*

1815.

10th Nov.

THE Attorney-General moved to set aside a non-suit. The action was brought for the non-delivery of rums; they were unladen by the master of the ship, and entered at the excise, but incorrectly, and therefore they were seized. The rums were deliverable to *Shirwell*, paying freight; he was out of town when the ship arrived, and he did not return till ten days after; and in consequence of his absence, the owners of the ship bonded the rums as twenty-one hogsheads of rum, and in the bill of lading the rum was described as twenty-one casks, ten puncheons, ten pipes, and one smaller cask, which was illegal. There was therefore a seizure; but the property was afterwards ordered to be restored, on payment of 40*l.* and expences.

When a consignee is not ready to receive the cargo, and the owners of the ship, desirous to get their ship clear, unload the cargo, and enter it with the excise, but erroneously, whereby they are seized, held that the ship-owners are not liable to consignees for the non-delivery of the rums, as the bill of lading did not properly describe the same.

LE BLANC J. I thought *Shirwell* not ready to do what he ought to do, and the defendants, as owners of the ships, had done nothing wrong; they were justified in clearing their ship, and the bill of lading did not properly describe the rums, and therefore the entry was improperly made; so that the owner of the rum occasioned the detention and damage, which the defendant ought not to bear.

LORD ELLENBOROUGH C. J. The action seems to have been brought in a wrong form.

Rule refused.

SPECIAL CASE.

1816.

9th Feb.

Rule *nisi* granted for the defendant to admit certain facts necessary to raise a question in a special case.

BUCKLE against **HOLLIS**, *Under-Sheriff of HANTS.*

GASELEE moved for a rule *nisi*, for the defendant to admit certain facts in a special case, in order to raise the question intended to be raised by the judge, and to amend the order of *nisi prius*, or for a new trial. The action was brought against the under-sheriff, on the statute for serving the office of under-sheriff for more than one year. The cause was tried before CHAMBRE J. at *Winchester*, and a special case reserved.

LE BLANC J. You must have the rule in the alternative, so as to give the other party an opportunity of either admitting it, or settling it in the only way in which the facts disputed in a case can be settled, namely, by a rule *nisi*.

Rule *Nisi*.

N. B. The counsel on each side had been before CHAMBRE J. on the subject: no cause was shewn, and therefore *rule absolute* for new trial; but the parties did not proceed to the trial at the next assizes.

1815.

8th Nov.

REX against **SMITH**.

Rule *nisi* granted for the *postea* to be handed over to the prosecutor, and for him to be at liberty to enter up judgment, defendant having neglected to settle the case reserved in *quo warranto*, for usurping office of mayor of *Colchester*.

SPANKIE, for the prosecutor, moved that the *postea* should be handed over to the prosecutor, and he be at liberty to enter up a judgment, the other party neglecting to settle the case reserved.

Rule *Nisi*.

STAMPS.

PERKINS against POTTS.

1814.

10th Nov.

BEST, Serj. moved to enter a nonsuit. This action was for building a house for the defendant, and the declaration was on an award which had an appraisement stamp, but no award stamp. *Best*, Serj. contended that it has been decided, that where the persons are only to fix prices, only an appraisement stamp is necessary. But it was here declared on as an award.

An appraisement does not require an award stamp, though in fact it is in the nature of an award.

LORD ELLENBOROUGH C. J. An appraisement is in its nature an award, as far as the subject matter goes. It is in name an appraisement, but in substance an award. It is final on the parties.

Rule refused.

WHELDON against MATTHEWS and another.

1815.

5th Nov.

CAMPBELL moved to enter a verdict for the defendant. The action was for goods sold and delivered; there had been a partnership between the defendants, but not by deed: the notice of the dissolution of the partnership in paper was produced to shew its dissolution. To this *Campbell* objected, that there was no stamp.

A stamp is only necessary where a paper is used as evidence of an agreement directly, and not where it is used incidentally; so it is evidence of an acknowledgment contained in it, though not stamped,

LORD ELLENBOROUGH C. J. A stamp is necessary where the instrument is used directly as an agreement, but not where it is introduced merely incidentally;

1815.

WHELDON
against
MATTHEWS.

otherwise it would be necessary to stamp all papers. This was only used as evidence of an acknowledgment by the defendants, of a partnership having subsisted between them.

Campbell. That evidence I submit ought to have been rejected.

PER CURIAM. The evidence should have been admitted.

Rule refused.

STRIKING OUT PLEAS, &c.

1811.

25th June.

CROKER *against* SIVEWRIGHT.

On a motion to strike out the plea of the general issue, and file a plea that the plaintiff was convicted of felony, the defendant must produce a certified copy of the record of conviction, and prove the identity of the party convicted.

STEPHEN moved for a rule to shew cause why he should not be at liberty to strike out a plea of the general issue, and to plead as of a former term, that the plaintiff had been convicted of felony; and that in the mean time proceedings should be staid. He had annexed to his affidavit a certified copy of the record of a conviction, which the Court had before said was necessary.

BAYLEY J. asked if the affidavit swore to the identity of the party. It appeared that the affidavit was headed in the cause, and then went on to say that it was the record of the conviction of the said *Croker*. Whereupon the Court granted a rule *Nisi*.

On 2d July the rule was discharged, on the plaintiff's undertaking to pay the money, when recovered, to the Lords of the Treasury.

STRIKING OUT REJOINDER.

GERRARD *against* GASKELL.

1818.

28th Nov.

PARKE, J. shewed cause in the first instance, on notice, against a rule moved by *Chitty*, to set aside a rule to produce the record. The plea was, judgment recovered. Replication *nul tiel* record, with verification, and prayer of damages. Rejoinder by defendant, that there is such record, and day given to produce it. The defendant struck this out, and then returned the paper book, with notice that he would rejoin in due time.

Rule to produce the record may be given, although defendant has struck out rejoinder of *nul tiel* record. When a motion is opposed in first instance, no costs of opposition can be allowed, though notice of motion was given.

Chitty cited 1 *Ld. Raym.* 550. and *Tidd's Prac.* (a) where it is said, that where the replender concludes with an averment and prayer of damages, the issue is not complete without a rejoinder; and in this case, the rejoinder having been struck out, there was no complete issue, and plaintiff was not at liberty to rule to produce the record.

BAYLEY J. This motion cannot be sustained. When judgment was pleaded on one side, and denied on the other, there was a fit issue. As the motion is opposed in the first instance, I cannot give costs. I wish I could.

Rule refused.

(a) *Tidd*, 7th ed. 782.

1813.

22d May.

If a cause where there is joinder on demurrer and no argument, be struck out of the paper, no one praying judgment, the cause must be entered *de novo* (a).

ANONYMOUS.

POLLOCK, F. moved for judgment for the plaintiff on demurrer, in a case where there was no argument. The cause had been struck out of the paper when called on in due order, nobody appearing to pray judgment for plaintiff.

LE BLANC J. Where it has been struck out, it ought to be restored again.

ELLENBOROUGH C. J. said, from this time we will not admit of these motions; and if they are struck out they must be entered again in regular course.

(a) When counsel has had his brief in due time, and is accidentally or inadvertently absent at the time the common paper is called over, the Court will now, on his moving for that purpose, allow him to take judgment as if he had been present.

SUBPŒNA.

BENNETT against JONES.

1815.

11th Feb.

MARRYAT shewed cause against a rule obtained for an attachment against the witness, for not attending the trial of a cause after having been served with a subpœna to produce judgment book, to prove day of judgment, which date does not appear by any of the records of the office. It appeared by affidavit, that when the subpœna was served on Mr. Jones, he said he would send his clerk with the book. The clerk accordingly attended, but not being able to explain the practice and the nature of the book, the plaintiff was nonsuited.

When an officer of the Court is served with a subpœna *duces tecum* to produce a judgment book; if the personal attendance of the officer be necessary, he must be informed so, or the Court will not grant an attachment against him, his clerk having attended with the book, though plaintiff was nonsuited in consequence.

PER CURIAM. To bring the officer into contempt, the person serving the subpœna should have stated that his personal attendance would be necessary.

Rule discharged.

SURETY.

ATKINSON against CARTER.

1818.

25th Nov.

CHITTY moved for a new trial, or to enter a nonsuit. This was an action on a guarantee, dated in 1817, and as follows: "I hereby engage to pay you, on Mr. Thomas Lamb's account, 50*l.*, at the expiration of the usual credit, on the event of any deficiency on his part so to do." It appeared that Lamb had become bankrupt. Chitty objected on the proved. *Semb.* "credit," and "usual credit," are synonymous. Notice to produce, served at eight o'clock of evening before trial, too late.

The consideration must be stated on the face of a guarantee. But no notice of non-payment by principal, or demand on surety, seems necessary to be averred or

1818.
 ATKINSON
 against
 CARTER.

trial; 1st. That a consideration was not stated in the guarantee. 2d. That there was a variance; the declaration describing the guarantee as "credit" generally, and in the guarantee the expression was "usual credit." 3d. That notice of the nonpayment by the principal, and of demand of payment on the defendant, were stated and were necessary, *Cro. Jac.* 500. but there was no proof of any demand on the defendant; a notice to produce a letter demanding payment was served only at eight o'clock in the evening before the trial, which it was submitted was too late (a).

ABBOTT C. J. I thought that the notice served at eight o'clock the night before the trial was too late. I thought there should have been a demand; but I refused to nonsuit the plaintiff on that ground.

Marryat and *Gaselee* cited *Wain v. Walters*, 5 East, 10. *Slade v. Gill*, 9 East, and 14 Ves. jun. and contended, that if it were necessary, the consideration sufficiently appeared on the face of the guarantee; and there was no variance, and no demand or request on the principal or surety was necessary.

THE COURT intimated a decided opinion, that the notice to produce was served too late, and therefore that the defendant was not bound to produce the letter; but they overruled the second and third objections, saying as to the last, that no notice or demand was necessary, for that a surety was bound to enquire and inform himself whether or not the principal had paid: besides, it appeared that the principal had become bankrupt, which excused a demand on him, or notice to the defendant. As to the first objection, the Court took time to consider; and ultimately decided that the guarantee was insufficient, for not distinctly disclosing on the face of it the nature of the consideration.

TITHES.

PAYNTON, Clerk, against ISAAC KIRKBY.

1818.

13th Nov.

FRERE Serj. moved to set aside a verdict obtained for the plaintiff at the *Cambridgeshire* summer assizes, before Mr. Baron GRAHAM, in an action for not setting out tithes in the parish of *Doddington*. In 1812, *John Kirkby* being then occupier of the land, entered into an agreement for payment of a composition in lieu of tithes for sixteen years, and paid such tithe until the year 1816, when he gave up the farm to *Isaac Kirkby*, the defendant. This action was brought against *Isaac Kirkby* for not setting out tithes, and for retaining them during the year 1816; and in answer to the action, the agreement with *John Kirkby* was set up. The tithes in question formed a part of those embraced by the contract.

Parol compositions for tithes are merely personal, and cease with the occupation of the tenant. The composition paid by the former occupier is *prima facie* evidence of value (a).

(a) It has been determined in a court of equity, that where a composition is made for tithes, and the incumbent dies, and his successor receives the next payment due under the composition, the executors of the deceased incumbent have a right to a rateable proportion of the money paid, with reference to the different periods of enjoyment. *Aynsley v. Wordsworth*, 2 Ves. and Beams, 331. But see *Williams v. Powell*, 10 East, 269. However, the composition determines on the death of the incumbent, and his successor is not obliged to give notice of his intention to take the tithes in kind; but if the successor, after induction into the benefice, accept the composition, such acceptance will be deemed a confirmation; and in order to determine the composition, a regular notice must be given. *Brown v. Barlow*, 3 Guillin on Tithes, 1001. *Bunbury*, 294. 10 East, 272. The notice to determine a composition is analogous to a notice to quit on a holding of lands, and therefore should be half a year's notice, ending at the expiration of the year. *Wyburd v. Tuck*, 1 Bos. & Pul. 458. *Tell v. Wilson*, 12 East, 83. While the composition subsists, the tenant cannot set up as a defence to an action for money due upon it, that the plaintiff was simoniacally presented. *Brookly v. Watts*, 2 Marsh. 38. 6 Taunt. 333. S. C.

1818.

PAYNTON
Clerk, against
ISAAC KIRKBY.

BAYLEY J. On the change of occupation the contract was at an end. It has been determined (b) that all these contracts are personal, and cease on the change of occupier or incumbent. When the agreement is not by deed it is merely personal, and ceases with the change of occupation.

ABBOTT C. J. Tithes cannot be let except by deed. The composition for retainer may be by parol, but then it is personal. The evidence of what the former occupier paid is *prima facie* evidence of the value, unless a change of circumstances is shown.

Rule refused.

(b) *Hastings v. Lord Foley*, T. T. 1818, was cited.

TRADE.

HAYWARD *against* YOUNG.

1818.

20th Nov.

GASELEE moved for the defendant, to set aside a verdict for the plaintiff, in an action on a bond, conditioned not to set up as surgeon or man-midwife in the town of *Aylesbury*, or within twenty miles; he objected that this bond was void, as in restraint of trade.

A bond by an apothecary, not to set up business within 20 miles, is not illegal as in restraint of trade (a).

ABBOTT C. J. May not the business of an apothecary extend for twenty miles, and might not the setting up within that distance be injurious to him? The principle so luminously laid down and commented upon in *Mitchell v. Reynolds*, 1 *Peere Wms.* 181. where Lord C. J. PARKER said, that it was quite out of the question to argue it in such a case, is completely applicable to the present.

Judgment for the plaintiff.

(a) See also 4 *East*, 198. 8 *East*, 80, as to arguments and rule on this subject. In *Davis v. Mason*, 5 T. R. 118, a bond, not to practise within 10 miles, was considered valid.

HEARN *against* GRIFFIN.

1815.

31st Jan.

ABBOTT for defendant, argued in support of a demurrer to a declaration, which stated that plaintiff was the proprietor of the one coach, and the defendant proprietor of another, and that an agreement was made between them that they should not run in oppo-

An agreement between two coachmasters not to oppose each other, or charge higher prices, is legal.

1815.

HEARN
against
GRIFFIN.

sition to each other, but should each charge the same prices to passengers. This stipulation, it was urged, was in restraint of that competition in trade which is so conducive to the interest of the public, and consequently was void.

ELLENBOROUGH C. J. How can you contend that it is in restraint of trade; they are left at liberty to charge what they like, though not more than each other? and by the agreement, particular days and times for each to run in the week are fixed. This is merely a convenient mode of arranging two concerns which might otherwise ruin each other.

Abbott then observed that there was a stipulation not to be engaged in other coach concerns, and that *Fagg*, of *Holborn*, should not have any concern in any other coach. The whole deed upon *oyer* was before the Court, and the Court will not support this contract; there is no consideration but the mutual restraint. There is no averment that they continued to run their coach. There was no partnership interest between the plaintiff and the defendant. They were proprietors of different coaches, and the covenant was in restraint of the other coach, though the party covenanting might cease to run.

BAYLEY J. If one ceases to run, is not the contract then at an end? and if you do not perform your part of the contract you should shew your excuse. A general restraint is bad.

ELLENBOROUGH C. J. If this argument could be sustained, then a covenant in an indenture of partnership, that neither of the parties should be engaged in any other business with any other persons, would not be good, because it might prevent the public from

having the advantage of his industry in another business. Each contracting party here has one day to work his particular coach. Nor is there any limitation as to size of the coach; the defendant may have a long coach. This agreement does not preclude a third or more persons from starting in opposition to plaintiff and defendant.

1815.

HEARN
against
GRIFFIN.

This case was afterwards settled.

TREASURER OF COUNTY.



W. B. MAINWARING, Esq. *Treasurer of the
County of Middlesex.*

1815.

22d Nov.

NICHOLSON moved, on the statute 53 Geo. 3. c. 113. s. 6, and on a certificate of the treasurer of the county of *Surrey*, for a rule calling on the treasurer of the county of *Middlesex*, to pay over money expended for the relief of a prisoner in the King's Bench and Marshalsea prisons, to the treasurer of the county of *Surrey*. He said the statute prescribed this mode of proceeding, on the production of the certificate of the treasurer on oath, and that the words of the statute are "*neglect or refuse*," to the former of which the certificate amounted.

A rule upon the treasurer of *Middlesex* to pay over money to the treasurer of the county of *Surrey* for the expence of relieving a prisoner in the King's Bench and Marshalsea prisons, on the 53 Geo. III. c. 113, s. 6, refused, because a demand and refusal were not sworn to.

BAYLEY J. You should have an affidavit of the application and *refusal*, or that Mr. *Mainwaring* is out of the way; and not having that, the motion is premature.

Rule refused.

TRESPASS FOR MESNE PROFIT.

1816.

2d May.

CHAMIER *and* PLESTOW *against* LLINGON.

A joint action for mesne profits may be supported by several lessors of plaintiff in ejectment, after recovery therein, although there were only separate demises by each.

BLOSSETT Serj. moved to enter a nonsuit in an action of trespass *quare clausum fregit*, for mesne profits. The defendant pleaded the general issue, and *liberum tenementum*. On the trial the record in an action of ejectment was produced, stating several demises of the present plaintiffs, but no joint demise. The possession had been delivered to an agent sent by the plaintiffs' attorney. The objection was, that this did not support a joint action of trespass.

BAYLEY J. Suppose they were tenants in common. The judgment in ejectment affirmed that some title in part was vested in each.

LORD ELLENBOROUGH C. J. Possession was delivered to an agent of both, which is *prima facie* evidence of the possession of both.

BAYLEY J. It was a general verdict, which affirms a title in part in each.

Rule refused.

TRIAL.

—♦—
ANONYMOUS.

1816.

3d July.

SCARLETT, on a former day, had obtained a rule to shew cause why the trial should not be put off, on an affidavit that a material and necessary witness in the cause was absent, and was not (under circumstances stated in the affidavit) likely to return till a certain day.

An affidavit, that a material witness is not likely to return till a day therein mentioned, impliedly swears that he is expected then.

Gifford now shewed cause, and contended that the affidavit was insufficient, on the ground that it did not positively state that he was expected to return on that day.

LORD ELLENBOROUGH C. J. An affidavit that a material witness is not likely to return until such a day, is an implied assertion that he is expected to return then, and such an assertion upon which perjury could be assigned.

Rule absolute.

Assignees of ——— against ———.

1814.

9th Nov.

CURWOOD moved to put off the trial of five causes, on the ground that a petition was before the Chancellor, as to the commission of an act of bankruptcy, and that they could not safely proceed to trial before it was heard, and that it was to be heard next petition day.

The Court will not put off the trial of a cause brought by the assignees of a bankrupt, because a petition is pending against the commission of bankruptcy.

LORD ELLENBOROUGH C. J. If we granted this rule, it would be a receipt to carry all cases of this nature over the term, for the party has only to file petition to do so; for it is the course in the Court of Chancery not to hear them till after Term.

Rule *Nisi* refused

TURNPIKE ACT.

1814.

17th May.

PHILLIPS *against* HARPER.

The exemption in the general turnpike act, 13 Geo. 3, c. 84, from payment of toll by a passenger crossing a road, and not going 100 yards thereon, is confined to carriages, &c. merely crossing the road (a).

ABBOTT stated that this was an action for money had and received, to recover back tolls paid by

(a) The statute (13 Geo. 3, c. 84, s. 34,) provides that no toll-gate shall be erected on the side of any turnpike road, unless ordered by the trustees at a meeting, after twenty-one days public notice, given in writing, affixed upon all the toll-gates erected on such roads, and also in some public newspaper circulated in that part of the country, specifying the place where such side-gate is proposed to be erected; and unless nine trustees at least (being a majority of those present) should sign the said order at such meeting; and that no person should be liable to pay toll at any toll-gate erected, or to be erected, across or on the side of any turnpike-road; or be subject to any penalty for any carriage, horse, or beast which should only cross such road, and not pass above one hundred yards thereon, except over some bridge, erected at a considerable expense by the trustees of such turnpike-road; any thing in this or any other statute notwithstanding. The provision in the new act, 3 Geo. 4, c. 126, s. 45. is, that no toll-gate shall thereafter be erected on the side of any turnpike-road, unless the same be ordered by the trustees or commissioners at a meeting, of which fourteen days public notice shall have been given in writing, affixed upon all the toll-gates erected on such road within ten miles of the place where such intended gate is to be erected, and within the trust for erecting the same; and also in some public newspaper circulated in that part of the country, specifying the place where such toll-gate is proposed to be erected; and unless five trustees or commissioners, at least, shall sign the said order at such meeting; and the exemption from toll is contained in the 32d section, which enacts, that no toll shall be demanded or taken by virtue of that or any other act of parliament, on any turnpike road, for any horses or carriages which shall only cross any turnpike-road, or shall not pass above one hundred yards thereon (the disjunctive being used instead of the copulative, and the exception as to passing over a bridge erected by the trustees being omitted). There appears to be some, though very slight distinction, between the case of *Phillip v. Harper* and that of *Major v. Oxenham*, 5 Taunt. 340, where the defendant passed through a gate, at which the tolls payable for carriages passing that road were collected, and continued upon the turnpike-road until he came to a lane turning off on the same side of the turnpike road on which he entered it (the lane leading to his

the plaintiff. The defendant pleaded the general issue, and a verdict was found for the plaintiff, subject to a case, from which the following facts appeared:—The turnpike-gate, through which the plaintiff passed, was situate near a bridge. By the turnpike act, 13 Geo. 3, c. 84, no side-gate can be erected without leave of the trustees; and no toll is payable for only crossing the road, and not passing above one hundred yards thereon. The bridge was not a county bridge. The side-gate had been erected near the bridge within the last few years, and long after the passing of the act. It was more than one hundred yards from the bridge. By an inclosure act the new road was set out; and those who go the new road go only nine or ten yards *along the turnpike road*. But it was contended, that they were liable to toll, since they went along the road in a straight line, and not in a cross or oblique direction.

1814.

PHILLIPS
against
HARPER.

LE BLANC J. Then the plaintiff contends that a party is not liable, unless he go one hundred yards upon the road?

Abbott. Certainly. The road mentioned is a road set out under an Inclosure Act, and not a turnpike road.

LORD ELLENBOROUGH C. J. As soon as a person sets a foot upon a road, he has used a road; but here there is an exception, if a person uses a road in *crossing*, for one hundred yards. [DAMPIER J. The case states that he was passing along the road towards *Abingdon*. *Abbott* said that was another trust.] These acts apply to the particular district to which

lime-kiln); he did not pass along the turnpike road quite one hundred yards, and did not, as the case stated, cross the road. The Court however held the case within the exemption; and said, that the statute meant to exempt carriages making a very slight use of the road.

1814.
 PHILLIPS
against
 HARPER.

they refer; and the tolls should be applied to the repairs of that district. Here the toll becomes payable within the district of the trustees.

Abbott said the difference arose from the circumstance of the tolls being payable according to the quantity of road passed over; viz. one hundred yards. The first question is, what is meant by such road: the crossing is not the material part of the section.

DAMPIER J. Crossing might raise a *sine qua non*: crossing and keeping on one hundred yards, are the words of the act.

*LORD ELLENBOROUGH C. J. The words are crossing the road.

DAMPIER J. He must cross.

LORD ELLENBOROUGH C. J. Crossing is the principal part which the legislature meant to privilege.

BAYLEY J. It is substantially the same road, though under different trusts.

LORD ELLENBOROUGH C. J. This general act applies to all turnpike roads. The words "across," &c. are too strong for us to get over.

LE BLANC J. Your argument would go the extent of shewing, that if a man had a house within one hundred yards of a turnpike-gate, he would never pay the toll.

Gaselee, amicus curiæ, referred to a late case from *Devonshire*, reported in the last number of *Taunton* (*Major v. Oxenham*, 5 *Taunt.* 340).

DAMPIER J. There they went out on the same side of the road.

Nonsuit entered.

UNDERTAKING.

ANONYMOUS.

1815.

3d May.

LAWES V. shewed cause against a rule obtained by *Ross*, calling on Messrs. *Wiltshire* and *Boulton*, attornies for the defendant, to put in bail pursuant to their undertaking, which had been given before the action was brought, "to appear to any process." Bailable process had been sued out, indorsed for 1000*l*. *Lawes* contended, that under this undertaking the attornies were not to be called upon to put in bail.

A general undertaking by an attorney to appear to process, does not oblige him to put in bail to bailable process (a).

Ross, contra, contended, that as the debt was 1000*l*. and the defendants had refused to pay, the undertaking must be understood between the parties to apply to bailable process.

PER CURIAM. The undertaking must be understood to apply simply to the appearance in the cause, and not to the putting in of special bail. It is the usual practice. It was only intended to save trouble, and to prevent the defendant's being personally served if it was common process.

Rule discharged with costs.

[There was no arrest, although *Lawes* contended there had been something equivalent to an arrest, which was a waiver of the undertaking. But the case was not decided on that ground.]

(a) But an attorney's undertaking to put in special bail made to the plaintiff, may be enforced by attachment. *Sedgworth v. Spur*, 4 *East*, 229. 1 *T. R.* 422. *Tidd*, 231.

VENDOR AND PURCHASER. ² ¹⁰ ¹¹

KING against PRICE.

The vendor of a horse who rescinds the contract, is liable to the purchaser for the keep of the horse during the time he kept it from the day of the contract.

THIS was an action for the keep of a horse. The defendant had sold a horse to the plaintiff, and afterwards rescinded the contract; and the question was as to the liability of the defendant for the keep of the horse, which had been delivered to the plaintiff at the time it was sold, and had been kept by him until the contract was rescinded.

ABBOTT C. J. The defendant having rescinded the contract entered into by his wife, for the sale of the horse, at some distance of time after the contract was made, must nevertheless be taken to have rescinded it from the day it was entered into. The horse was kept by the plaintiff in the intermediate time, and it was received back by the defendant, improved in value by the keep which the plaintiff had bestowed upon it. We think, therefore, that the verdict, by which the defendant is rendered liable for the keep, is correct.

Rule refused.

VENUE.

SHEPHEARD *against* HALL.

1817.

17th Nov.

MARRIOTT moved to change the *venue* in an action of assault.

Venue changed in action for assault, rule absolute in first instance.

THE COURT much doubted whether it was allowed in assault, and at first granted a rule *nisi*.

But *Gurney, amicus curiæ*, having stated that it had been done in actions for criminal conversation, and libel. (See *Gerard v. Hodge*, 10 *East*, 32. 3 Term Rep. 30. 1 *Brod. and Bingham*. 299.)

THE COURT, after consideration, informed *Marriott* that he might take his rule absolute in the first instance.

ANONYMOUS.

1816.

24th May.

SPANKIE moved to discharge a rule to change the *venue*. The action was by original against three defendants, and the motion to change the *venue* was by one, the other two having suffered judgment by default. There were many cases which decide (a), that where there are more than one defendant, the *venue* cannot be changed by one, because he cannot oblige the others to undertake that error shall not be assigned for want of an original.

A motion to change the *venue* cannot be made by one of three defendants without the consent of the other two, notwithstanding they had suffered judgment by default, and colluded with the plaintiff, as it was suggested, to withhold their consent (a).

(a) *Vide Braddley and others v. Rippon and others*, 5 *Taunt.* 87. *Groves v. Thackery*, *id.* 631, in C. P. that *venue* cannot be changed into county palatine, in an action by original, at the instance of one only out of several defendants.

1816.

ANONYMOUS.

Littledale shewed cause, and suggested that the consent^a of the two other defendants could not be obtained, because they had colluded with the plaintiff.

Rule *Nisi*.

On the 27th *May*, the rule was made absolute, the consent of the other defendants being considered absolutely necessary.

1815.

ANONYMOUS.

29th *April*.

The issuing of the writ is material evidence, in an action for an escape, so as to enable the plaintiff to bring back the venue to *Middlesex* on the usual undertaking; and therefore in such an action the venue cannot be changed from *Middlesex* to *Northamptonshire* on a rule *nisi*.

ADAMS moved to change the venue from *Middlesex* to *Northamptonshire*. The action was against the sheriff for an escape. The affidavit did not state whether the escape was on mesne or final process.

DAMPIER J. The issuing of the writ must be material evidence here. They will be able to bring the venue back. But you may have at that risk a rule *nisi*. In an action for infringing a patent, the venue cannot be changed from *Middlesex* to any other county, the patent being the substratum of the action. *Cameron v. Gray*, 6 T. R. 363. *Kensington v. Churtles*, 2 M. and S. 36.

1814.

ANONYMOUS.

20th *May*.

Rule *nisi* granted to change venue from *London* to *York*, four

LITTLEDALE moved for a rule *nisi*, to change the venue from *London* to *York*. The action was which the venue is wished to be changed. 2 *Marsh*. 152. The Court however will sometimes on a special ground grant a rule for changing the venue, although it is laid in the proper county. See *Tidd*, 635, and *post*,

(a) But see that the venue cannot in general be changed in an action on a bill of exchange, &c. *Tidd*, 633, and 1 T. R. 571, argued. And it has been held in C. P. that in an action by an attorney for an escape, it is not a sufficient ground for deviating from the general rule not to change the venue in such a case, that the witnesses on both sides reside in the county to which the venue is wished to be changed. 2 *Marsh*. 152. The Court however will sometimes on a special ground grant a rule for changing the venue, although it is laid in the proper county. See *Tidd*, 635, and *post*,

on a bill of exchange; and he moved on an affidavit, that four witnesses were at *Leeds*, and only one fact occurred in *London*, which was admitted. And the COURT, under the special circumstances of the case, granted a

1814.

ANONYMOUS.

Rule *Nisi*.

even in an action on a specialty. 1 T.R. 781; and *Anon. June 20, 1816*, where the *venue* was changed in an action of debt on bond, on an affidavit that all the witnesses lived in the county to which the *venue* was desired to be altered.

ATKINSON *against* SADLER.

1814.

28th June.

PARKE moved to change the *venue* from *York* to *London*, the cause of action having accrued in the river *Humber*, in the county of *York*, on the ground that several material witnesses were in the *Greenland* trade, and would be absent at the time of the *York* assizes.

Rule *nisi* granted to change the *venue* from *York* to *London*, the witnesses being *Greenland* fishermen, who would be absent at the time of the *York* assizes.

THE COURT granted a rule *nisi*, to shew cause before a Judge at Chambers.

ANONYMOUS.

1816.

12th Feb.

PULLER shewed cause against a rule to change the *venue* in this case. The action being in covenant, he contended that it could not be done, unless on some strong grounds. *Holnott v. Cox*, 8 East, 268. The *venue* was sought to be changed from *Gloucester* to *Somersetshire*. An application had been made for a *view* to inspect a partly built house, on the *Gloucester* side of *Bristol*. An old witness also who was resident at the same place, could not be removed.

The Court will refuse a rule to change the *venue* in an action on a breach of covenant, though there was a view prayed, because no preponderating circumstances were shewn to make the changing of the *venue* necessary.

LORD ELLENBOROUGH C. J. Unless there is some

1816.

ANONYMOUS.

preponderating circumstance, we shall not take away from the plaintiff the option which he has of laying the *venue* in any county he may think proper.

Gifford admitted that the view was the only point upon which he could rely; and that was not answered by the other side.

LORD ELLENBOROUGH C. J. said, that if the Court granted the rule, they would have to distinguish every case merely on the ground of a view.

Rule discharged.

Puller, for plaintiff.

Gifford, for defendant.

1816.

19th Nov.

WHITEHEAD *against* WYNNE.

A penal action for non-residence must be brought in the county in which the living is situated.

TADDY stated that this case arose on a writ of error from the Common Pleas, on a question whether the *venue* had been properly laid. The action was brought under the statute 43 Geo. 3, c. 84, s. 12, for non-residence, and he contended that it should have been brought in the proper county. 31 *Eliz.* c. 5, s. 7.

Heath, contra, (after noticing that the 21 *Jac.* 1. c. 4, did not extend to subsequent statutes; upon which LORD ELLENBOROUGH C. J. said, that it was settled by the case of *Barber v. Tilson*, 3 *Mau. & Selw.* 429, that a penal action must be brought in the proper county, by virtue of the 31 *Eliz.* c. 5), referred to the case of *Grimston v. Molineux*, *Hobart.* 251, and the marginal note there, as well as the index, and said the question was, whether the act charged here was a mis-feazance or non-feazance. The statute 31 *Eliz.*

c. 5, s. 2, speaks only of offences *done or committed*, and the present action, which is founded on the stat. 43 *Geo. 3*, c. 84, s. 12, against the defendant for wilfully absenting himself from his benefice, is peculiarly for an act of nonfeazance, and not of misfeazance, if any distinction exist between the two terms. But

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LORD ELLENBOROUGH C. J. said, that the case in *Hobart* seemed to be only a queried case, and the marginal note was merely an observation of the reporter; and that the case stated in the index, tit. "Recusancy," was still less maintainable; and also that he could not rely upon the authority of an index, so as to extend the author's meaning beyond the import of the body of the work. It was monstrous that the plaintiff should take a clergyman from *Cumberland* down to *Cornwall*, to try a fact of this kind. And he likened the case to that of a person liable to the bankrupt laws, leaving his dwelling house.

BAYLEY J. referred to *Barber v. Tilson*, 3 *M.* and *S.* 429 (a), the doubt in which arose upon the statute of *James 1*; before that case, the general words of the statute of *Eliz.* were not sufficiently adverted to; but it was now clear, that penal actions must be brought in the proper county.

ABBOTT J. read the 7th section of the stat. of *Eliz.* and observed, that it alluded particularly to certain cases of non-feazance, from which a clear inference arose, that acts of that kind were within the scope and purview of the statute. It was fit that the action should be brought where the cause of action arose; for it would be a great hardship to the defendants if

(a) See 1 *Marsh.* 321, in note. 4 *East*, 385.

1816.

WHITEHEAD
against
WYNNE,

the law were otherwise. That hardship was intended to be remedied by the statute of *Elizabeth* (the recital of which his Lordship read). And he said, the place where the cause of action arose is where the defendant ought to have resided.

Judgment for plaintiff in error.

1815.

25th Novr.

ANONYMOUS.

The Court will only under particular circumstances grant a view, in an indictment for perjury; but a view will be refused, if there be any risk of its misleading the jury.

CURWOOD moved, on behalf of the prosecutor, for a view, in a prosecution for perjury, alleged to have been committed in a cause in the Exchequer against the present prosecutor, for having contraband spirits brought into his premises. The defendant, who was a witness on the trial, had sworn that the contraband spirits were put into the prosecutor's premises through a hole; and upon view it would appear that it was impossible there should have been a hole.

LORD ELLENBOROUGH. Upon circumstances, such a view may be given; but in this case it might mislead: you may give evidence of it.

Rule refused.

WARRANT OF ATTORNEY.

ANONYMOUS.

1815.

8th May.

BERENS shewed cause against a rule obtained by *Andrews*, to set aside judgment and execution on a warrant of attorney, and to deliver it up to be cancelled.

A subsequent assignment of goods for the sum secured by a warrant of attorney, is not a waiver of the warrant of attorney.

Andrews contended that the plaintiff had afterwards taken an assignment of the defendant's goods, &c. for the sum for which the warrant of attorney was given, which was a waiver of it. But

LE BLANC J. said that no such effect would result from taking the second security.

Rule discharged, with costs.

DELANE *against* MOTT.

1821.

3d Feb.

MOTION to pay back to the defendant the costs of an action, levied under a warrant of attorney given for the payment of an annuity granted by deed to the plaintiff, on which the latter had commenced an action, which was depending at the time the warrant of attorney was given. The defendant had been arrested, and before the action proceeded to declaration, he gave a warrant of attorney for the amount of the annuity due, with a defeazance to pay the money

Where the plaintiff brought an action upon an annuity deed, and afterwards took a warrant of attorney for the sum due, with a provision, that if within a certain time the annuity was not paid, he should be at liberty to take out execution

for the sum specified, together with all costs incurred for or by reason of the non-payment of the annuity; held, that he was not at liberty under this clause to take out execution for the costs of the action.

1821.

DELANE
against
MOTT.

within forty-two days ; and in default of payment, the warrant of attorney contained a provision, that the plaintiff should be at liberty to take out execution for the annuity and interest thereon, together with such costs as he had incurred by reason of the non-payment thereof. The defendant not having paid the annuity within the time stipulated, the plaintiff levied upon the defendant's goods for the arrears and the annuity, together with the costs of the original action. The question was, whether under the warrant of attorney, the plaintiff was at liberty to levy for those costs.

Bayley F. shewed cause against the rule, and contended that the costs of the action must be understood to be comprehended within the words of the warrant of attorney, which provided that the defendant should pay all costs and charges incurred by the plaintiff for or by reason of the non-payment of the annuity.

Chitty, in support of the rule, insisted that the words referred to, would not include the costs of the action.

THE COURT being of this opinion, ordered the plaintiff to return those costs which had been levied under the execution, leaving it to the Master to exercise his discretion as to whether any, and what costs, the defendant ought to receive back in that respect. But as to the costs of the execution under the warrant of attorney, they certainly ought to be paid by the defendant.

Rule absolute, in so far that the plaintiff should restore the costs of the action.

WARRANTY.

SHILLITOE *against* CLARIDGE.

1816.

18th June.

WILLIAMS J. shewed cause against a rule for a new trial. The action was brought on the warranty of a horse, which had a cough when it was sold.

LORD ELLENBOROUGH C. J. If it had, and the cough was of a permanent nature, I have always held that it was a breach of the warranty; and such has, I believe, always been the understanding, both in the profession and amongst veterinary surgeons. On that understanding I have always acted, and think it quite clear. (See *Elton v. Broyden*, 4 *Campb.* 281. 1 *Stark.* 127. 2 *Esp.* 673. *Holt*, C. N. P. 630. 1 *Hen. Bla.* 17. 2 *Stark.* 81.)

J. Williams, for the defendant, urged that at present two-thirds of the horses in *London* have coughs.

LORD ELLENBOROUGH C. J. Be it so; but still it is a breach of the warranty.

Tindale contended, though there was a warranty, yet the plaintiff was told that the horse had been used only on the road, and had a cough; therefore he had knowledge of the unsoundness, and having sent it to a hunt, he made an improper use of it, and aggravated the disease.

A cough, unless proved to be of quite a temporary nature, is an unsoundness, and a verdict for the defendant was held wrong, though the horse had, the next day after the warranty, been rode a hunting. When it is through the error of the jury, a new trial is granted on payment of costs; but it is otherwise when through their misconduct, though an affidavit of the misconduct of the jury was produced when the rule *nisi* was moved for, yet as it was not referred to in the rule *nisi*, it cannot be made use of when the rule absolute is moved; for the rule *nisi* not being drawn up upon reading it, the other party had no notice of it.—It

may be made part of the rule, that the judge's notes of the evidence of an aged witness should be read in evidence in case he could not attend; but is unnecessary for legal evidence between the same parties.

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LORD ELLENBOROUGH C. J. Knowledge makes no difference. There was a case before Mr. *J. Lawrence*, in which it was held, and it was there said, that the plaintiff might rely upon the warranty only, and not choose to trust to his own knowledge. I have always understood that a cough is an unsoundness : the horse was unsound then when he was bought ; and there is no proof of any discontinuance of that unsoundness, or that he would have got well if he had not been hunted.

BAYLEY J. There is no evidence of mismanagement.

HOLROYD J. The defendant's evidence is not at all in contradiction of the plaintiff's : he does not at all deny the unsoundness of the horse at the time of the purchase.

LORD ELLENBOROUGH C. J. The horse was bled for the cold before he was sold, and there is no proof that it was a temporary cold, or that it would be so.

Williams J. and *Tindale* applied that the rule should be made absolute on payment of costs.

Raine, contra.

LORD ELLENBOROUGH C. J. said that it was the rule, that where the verdict has been the error of the jury, the new trial is always with costs ; but where there is any misconduct in the jury, Lord *Kenyon* had made an exception, and we have also often done so since.

Raine referred to an affidavit of the misconduct of the jury, upon which he had obtained the rule.

BAYLEY J. It is not mentioned in the rule, which is not drawn up on reading the affidavit.

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Raine said he had given it in when he moved the rule.

BAYLEY J. said, then he should have seen that the rule was drawn up properly upon it; for otherwise the other party had no notice of it, and may not have seen it.

Raine moved, that as one of the witnesses was very old and ill at the time of the trial, it should be made a part of the rule, that the Chief Baron's note of his evidence should be read on the new trial.

LORD ELLENBOROUGH C. J. said that that might be made part of the rule.

Rule granted accordingly.

CASES,
 DETERMINED IN
The Court of King's Bench,
 IN THE TIME OF
LORD MANSFIELD,
 PRINCIPALLY
Between A. D. 1780 and 1787 (a).

FARRINGTON *against* CLARKE.

1782.

11th June.

THIS was a special case, stated for the opinion of the Court, as follows.

Where defendant, acting under a power of attorney from plaintiff, took out administration at Bengal to the estate of a deceased debtor, by bond to plaintiff, and received monies under the administration, Held, that he could not retain as against the plaintiff, on the ground of a subsequent administration obtained by other creditors in this country.

This was an action for money had and received by the defendant for the use of plaintiff. The defendant pleaded the general issue, *non assumpsit*, whereupon issue was joined. The cause came on to be tried at the sitting after *Easter Term*, 1782, at *Guildhall, London*, before the Right Honourable the Earl of *Mansfield*, Lord Chief Justice, when the Jury found a verdict for the plaintiff, damages 254*l.*, and costs 40*s.*,

(a) *N. B.* These cases were decided at a time when there was no publication of reports in K. B. viz. between *Douglas's Reports* and the *Term Reports*, and have been selected from the paper books and MS. of the late Mr. Justice *Ashurst*, with the arguments and judgments of the Court in his own hand-writing, and are consequently very authentic and valuable. The author is in possession of a considerable collection of the MS. of that learned judge.

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subject to the opinion of the Court on the following case: That at the time the defendant received the effects now in his hands, the plaintiff was a bond creditor of one *William Plaw*. That the defendant received the effects of the said *William Plaw*, under an administration obtained by him in *Bengal*, as attorney for the plaintiff, and under a power of attorney granted to him for that purpose. That the defendant arrived in *England* about the month of *December*, 1781, having the said sum of 254*l.*, the amount of the effects he so received, in his hands, and he still holds the same. The administration was decreed to *Plaw's* widow, by the Prerogative Court of *Canterbury*, in *November*, 1781. That Messrs. *Hodges* and *Hill*, two of the said *William Plaw's* bond creditors, are the present administrators of his estate, under a renunciation made by his widow, in the Prerogative Court of *Canterbury*, in *February*, 1782. That the defendant had notice after the commencement of the action, but before the trial of the cause, from the said Messrs. *Hodges* and *Hill*, not to pay the said sum of 254*l.* to the plaintiff, but to retain it for their account, as the administrators in *England* of the said *William Plaw's* effects. The question for the opinion of the Court was, whether the plaintiff, by virtue of the administration granted in *Bengal* to the defendant, as his attorney, or the said Messrs. *Hodges* and *Hill*, by virtue of the administration granted to them here, were entitled to the effects of the deceased *William Plaw*, received by defendant: if the Court should be of opinion that the plaintiff was entitled to recover in this action, then the verdict to be entered for the plaintiff, damages, 254*l.*, and costs, 40*s.*: but if the Court should be of opinion that the plaintiff is not entitled to recover in this action, then the verdict to be entered for the defendant.

Rous for plaintiff. The defendant has acted solely

as the attorney for plaintiff, and therefore he cannot be permitted to set up the right of a third person ; but even if the rights of the different administrators should be brought in question, that of the plaintiff is preferable. The plaintiff's administration is prior to that of the defendant. The defendant must contend plaintiff's administration is a nullity, otherwise it stands unrepealed. The jurisdiction under which the plaintiff claims administration is local, and *in rem* 1 *Salk.* 29—37. Here there is an express authority by parliament to erect this jurisdiction. The 13 *Geo.* 3. gives them ecclesiastical jurisdiction, and power to grant administrations and probates. Here administration is granted to defendant as plaintiff's attorney (who is a bond creditor). When (as in this case) there is no application on the part of the next of kin, the Court may grant authority to any person to collect the effects, &c. The administration stands unrepealed, and is granted to the defendant merely as attorney for the plaintiff ; and the defendant being administrator of the deceased, and attorney to the plaintiff, his receipt of money to the account of the plaintiff's debt, is, in effect, payment of it to the defendant, as the plaintiff's agent. The defendant was bound to pay it over to the plaintiff when he received it ; and being received before administration granted here, a payment to the plaintiff would be a due administration of the assets.

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Law, for defendant. The point is, whether the administrator, acting under an administration in *Bengal*, can retain the effects after he comes into *England* against the administrator here. I admit he had authority to receive, to distribute, and pay, and do every necessary act there. He might have retained for his own debt, but not for the debt of the plaintiff. The defendant must answer to the creditors, for having taken on himself the character of administrator ; he must pay according to priority ; he could not pay the plaintiff his

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debt if there were judgments existing. If there was no application of the assets, during the operation of law, to pay the plaintiff's debt, there was none in fact; and having made none before he came over here, the claim of the administrator here is superior to the plaintiff's. *Salk.* 306. The character of attorney and administrator do not interfere. Assets abroad might have been collected in *Bengal* under a prerogative administration, before the regulating act of 13 *Geo.* 3. He cited 3 *P. Wms.* 369. 11 *Vin.* Ab. tit. Executor.

PER CURIAM. Defendant acted under authority from the plaintiff, and retained the money for plaintiff, and it is as a payment to him. Defendant cannot pay it into the hands of another person, who only wants to get the assets, that he may retain for his own debt.

Judgment for plaintiff.

1784.

14th May.

EDMUNDS and others against Cox and others.

If after reference by bond, one of several of the obligees dies before award made, the arbitrators cannot award a payment to the survivors and executors of deceased, and that they shall release obligors. *Qn.* If the award would have been good, if made on surviving obligees only (a).

DEBT on bond, dated 21st July, 26th year of the reign, given by defendants to *Elizabeth Kent* and plaintiffs, for the payment of 300*l.*

Plea, after craving oyer of bond and condition, states the latter as follows :

"The condition of this obligation is, that if the above bounden defendants, *B. C.* and *J. C.* and every of them, their, and every of their heirs, executors, and administrators, for their and every of their parts and behalfs, do in all things well and truly stand to, obey,

(a) See 1 *Marsh.* 366. Death of a party before award made, is a revocation of the arbitrator's authority, where cause referred by order of *nisi prius*, and verdict taken subject to award, unless expressly provided for. 2 *B.* and *A.* 394. Parties should always insert a clause in the bond or agreement of arbitration, or in the order of *nisi prius*, to obviate this effect arising from the death of either party. *Id. ibid.* Death is a revocation of authority, even in equity. See 17 *Ves.* 241.

abide, perform, fulfil, and keep the award, order, arbitrament, final end and determination, of, &c. *J. P.*, of, &c. *Gent.* and *T. W.*, of, &c. or any two of them, arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the above bounden defendants, as of the above named *E. K.* and the plaintiffs, to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, indictments, prosecutions, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or any of them, so as the said award be made in writing by the said arbitrators, or any two of them, on or before the 5th day of *November* next ensuing the date hereof, then this obligation to be void, or else to remain in full force. And the said several obligors do consent and agree, that this submission to the award above mentioned shall be made a rule of his Majesty's Court of King's Bench, at *Westminster* : " *actio non*, because " the arbitrators in the said condition above mentioned did not, nor did any two of them, make any award between the said defendants and the said *E.* and the said plaintiffs in the said condition named, according to the form and effect of the said condition ;" concluding with a verification of judgment.

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Replication, that after making of the bond, and before 5th *November*, in the condition thereof mentioned, the said *E. K.* died, having by her will appointed *M. K.* and *W. E.* her executors; that two of the arbitrators, after her death, made their award, thereby awarding, that defendants should pay unto the plaintiffs, and the said executors of *E. K.* the sum of 70*l.*, in full dis-

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charge of all monies, &c. due or owing by defendants unto the said *E. K.* and the said plaintiffs, or any of them, upon any accounts before the execution of the bonds of arbitration; and that all actions, &c. should cease; and that the executors and plaintiffs should give releases to defendants. The defendants did not pay the sum awarded.

Demurrer to this replication, assigning as causes, "For that it appears in and by the condition to the said writing obligatory annexed, that the award, (if any made, ought to have been made between the said defendants and the said *E. K.*, and the said plaintiffs; and for that the said defendants have, in and by their plea aforesaid, alleged and pleaded, that the said arbitrators, in the condition above named, did not, nor did any two of them, make any award between those parties in the said condition named, according to the form of the said condition; and for that it appears in and by the said plea so pleaded in reply, that the said pretended award therein set forth was not made between the said parties, but was made after the death of the said *E. K.*, and therefore the said plea so pleaded in reply is not any answer to the said plea of the said defendants, by them pleaded in bar in form aforesaid. And for that the power of the arbitrators to make any award of and concerning the premises to them referred, ceased upon the death of the said *E. K.*, and therefore the pretended award aforesaid is null and void in law, and as if no award had been made of or concerning the premises referred as aforesaid; and for that the said replication is, in other respects, uncertain, insufficient, and informal," &c. Joinder in demurrer.

Morgan, for the defendant. The question in this case is, whether the power of the arbitrators was not determined by the death of *Elizabeth Kent*. I contend

it is revoked, upon the authorities in 3 *Vin. Abr.* 434. 1 *Danvers Ab.* 670, pl. 4. Sir *W. Jones*, 338. At common law, the death of a party before verdict and judgment, was an abatement of the suit. Here was a total revocation of the power of the arbitrators; and the bond is not single, but is to perform an award; and if there is no award, there is nothing to be performed.

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Bower for plaintiff. The bond binds the party, his executors and administrators; why should they not be comprized as to the subject matter of the award? If the award was made in the testator's life time, the executors would be clearly bound by it. This is a joint cause of action, which survives at law, though in equity only the executors are to have the benefit of it (*a*). If the action survives, the award is only void as far as relates to the executors. It is good as to the rest. 2 *Ventr.* 249; 1 Lord *Raym.* 247; *Salk.* 69; *Carth.* 378, in support of this argument, were cited.

PER CURIAM. The arbitrators have considered the executors as parties before them; that could not be done. Had the award been between the defendants and the survivors, it might have been very doubtful whether that might not have been good, as the cause of action survives. But upon the form of the present award, the objection is fatal, as the arbitrators have awarded the money to be paid to the survivors and the executors, and the executor, as well as survivors, are to give releases; whereas he had no power to order the executors to do the act.

Judgment for defendant.

(*a*) Sec 1 *East*, 497. *Salk.* 444. 1 *Chitty* on Pleading, 12.

1782.

GOLDING *against* J. and G. VAUGHAN.*Easter Term.*

A demand against a surviving partner as survivor, may be joined with a demand due from him, as if he were solely liable (a).

DECLARATION in *assumpsit*, for goods sold and delivered to defendants, and one *George Vaughan*, the father, in his life time, since deceased; also containing a count for goods sold and delivered to defendants alone, and other common counts, upon promises made by them.

To this declaration the defendants demurred, on the ground of a misjoinder of action, and assigned the following causes of demurrer :

For that the said plaintiff hath, in and by the declaration aforesaid, declared against them the said defendants, as surviving partners of a third person; to wit, *George Vaughan*, the father; and also against them the said defendants, upon promises alleged to have been made by them only; and therefore it appears, in and by the declaration aforesaid, that the said plaintiff hath included two incompatible demands in one and the same action; and for that the damages to be recovered are entire, so that no proper judgment can be given by the Court, as it cannot be said or determined

(a) There does not appear to have been any other express decision on this point, excepting *Richards v. Hewther*, 1 Bar. & Al. 29. The cases however in 6 T. R. 582. *Slipper v. Stedstone*, 1 Esp. Rep. 47, and 5 T. R. 493. 1 B. and A. 29, are to that effect. Under the above form of declaration plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner. 1 Barn. and Ald. 29. And so he might if he charged the defendants in declaration as solely being indebted to him, without any counts as for debts due from defendants and deceased partner; it not being absolutely necessary, though usual, to sue the defendants as surviving partners. *Id. ibid. Baguel v. Rogers*, M. T. 1819. But this rule is otherwise with regard to surviving plaintiffs, who must always sue as such. See 4 Barn. and Ald. 37. 2 Saund. 121, n. l. 2 Stark. 365. A surviving plaintiff may, however, in an action brought by him as such, include a debt due to him in his own right, expressly declaring as surviving partner. See 3 T. R. 433. 5 T. R. 493. 6 T. R. 582.

what damages shall be adjudged against the defendants. as surviving partners, and what damages shall be adjudged against the said defendants in their own right; and for that the declaration aforesaid is in other respects uncertain, insufficient, and wants form.

Joinder in demurrer.

Morgan, for the defendant, contended, that these demands cannot be joined in one action, because the rights of different persons are involved. 2 *Vin.* Abr. 38, 40. 44. *Hob.* 88. *Cro. Eliz.* 406. Even where an executor is plaintiff, he cannot join in an action, a demand in right of an executor, and one in his own personal right. 2 *Lev.* 110. *Salk.* 10. *Show.* 366. *Carth.* 235. In the present case there is no survivorship, as the *jus accrescendi inter mercatores locum non habet*. If there should be a general verdict against the defendants, they would then have to proceed for contribution against the representatives of the deceased partner. But as something would be recovered against the defendants on their own liability, and something in their character of surviving partners, it will be uncertain what was the proportion of each. How, also, are the costs to be ascertained, suppose the defendants should plead a set-off?

SED PER CURIAM. There is nothing in the objection, though, in some cases of partnership, the right or liability may beneficially serve for or against the executors of the deceased partner; yet, at law, the legal right and liability entirely survive against and for the surviving partners, who alone can at law sue and be sued.

Judgment for plaintiff.

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*TAMM and another against WILLIAMS and another.**Easter Term.*

In a plea of foreign attachment, it is necessary to aver that the garnishee resided within the jurisdiction of the mayor's court. *Qu.* If it is not also necessary to aver that the defendant, in action in mayor's court, had notice of the custom, and of the attachment against garnishee (*a*).

DECLARATION in *assumpsit*, for goods sold and delivered, and the common money counts, and account stated.

Plea, general issue, except as to 79*l.* 0*s.* 9*d.*, and as to that sum, that it was satisfied under an attachment upon the defendants as garnishees, upon a judgment recovered in the mayor's court, according to the custom of the city of London. The plea, however, did not state that the defendants in the action in the mayor's court were within its jurisdiction, or that they had notice of the custom (*b*), or of the attachment. Upon

(*a*) See Precedents of Pleas, 5 *Taunt.* 234. 2 *H. B.* 362. According to the case of *Banks v. Self*, 5 *Taunt.* 234, note, in a plea of foreign attachment, it is not necessary to aver the custom, that the plaintiff below shall swear to the debt, or the fact that he did swear to it; neither that the plaintiff in the principal case was indebted to the plaintiff below, within the jurisdiction of the mayor's court, nor that a writ of *sci. fa.* issued against the garnishee; and it is enough if it shew he was warned to shew cause. And, in a foreign attachment, it is not necessary that the debt should arise within the jurisdiction, or that the defendant in that court should reside within it, or be actually summoned. 5 *Taunt.* 225. But if the plea state the custom to be "that if any person be, or hath been, indebted to any other person within the said city," &c. it ought to aver, that the defendant in the action was indebted to the plaintiff within the city. See 2 *H. Bl.* 362. And according to the decision in *Welter and another v. Rucher and another*, 1 *Brod. and B.* 491, it seems that the case reported in the note of *Taunton* is much qualified in one respect, viz. that in order to discharge the garnishee, execution must be actually executed, and that award of execution be made; and that these facts ought to appear in the plea. The payment must be compulsory to discharge the garnishee; and the entering a sum to the credit of a party in a merchant's book is not payment, unless under an express assent that such entry shall stand for payment. 1 *Brod. and B.* 491. A plea of foreign attachment may, it seems, be given in evidence under the general issue *non assumpsit*, 3 *Wils.* 297. 5 *Taunt.* 228. 3 *East*, 367. But in an action on a deed, it must be pleaded. 1 *Saunders' Rep.* As to the necessary evidence of the attachment and proceedings, &c. in Mayor's Court, see 3 *East*, 367. 3 *Wils.* Rep. 297. 2 *Black. Rep.* 834. 5 *Taunt.* 234.

(*b*) It will be useful to give the form of the plea, which was as follows, — As to the sum of 79*l.* 0*s.* 9*d.* *actio non*: — Because they the

these grounds, the plaintiffs in this action demurred to the plea, and in their demurrer assigned for causes, that

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said B. and J. say that the city of *London* is, and time out of mind hath been, an antient city; and that there now is, and time immemorial hath been, a certain custom used and approved within the same city, that is to say, that if any person be, or hath been, indebted to any other person within the said city in any sum of money, and for recovery thereof such person affirm or hath affirmed a bill in original in debt in the court of his present Majesty, or of his predecessors, kings or queens of *England*, held or to be holden before the mayor and aldermen of the said city for the time being, in the Chambers of the Guildhall of the said city, within the said city, according to the said custom of the said city, against such person so indebted; and by virtue of such bill original it be or hath been commanded by the said court to any of the serjeants at mace of the said mayor and aldermen for the time being, and a minister of the said court, to summon such person named defendant in the said bill original to be and appear in the same court, held before the mayor and aldermen of the said city for the time being, in the Chamber of the Guildhall of the said city, to answer the plaintiff in such bill original; and if such serjeant at mace and minister of the said court, by virtue of such precept, return and certify, or hath returned and certified to the said court holden as aforesaid, that such defendant in the bill original hath or had nothing within the liberties of the said city, by which or whereby he can or could be summoned, nor is nor was to be found within the same city; and such defendant at that court being solemnly called, doth not appear, or hath not appeared, but makes or hath made default; and in the same court it be or hath been testified or notified to the same court by the plaintiff in the said original bill, that any other person be or hath been indebted to any such defendant, in any sum of money amounting to the sum of the debt in such bill original specified, or any part thereof, then at the petition of such plaintiff, it is and hath been commanded by the said court to one of the serjeants at mace and a minister of the said court, to attach such defendant in such bill named, by such sum of money so being in the hands or custody of such other person, so that such defendant be and appear at the said court, or at the then next court held or to be holden before the said mayor and aldermen as aforesaid, to answer such plaintiff of and in the plea in such his bill original specified; and if such serjeant at mace and minister of the same court, at the same or at the then next court held or to be holden as aforesaid, return and certify to the said court, such defendant to be attached by such sum of money so being in the hands and custody of such other person, and the same sum in the hands and custody of such other person defended, so that such defendant in such bill original named, be and appear at such same or the then next court, held or to be holden as aforesaid, to answer such plaintiff in the plea in such bill original specified; and if such defendant at that and three other courts from thence next severally held or to be holden before the mayor and aldermen of the said city as aforesaid, that is to say, at four such courts, be or hath been solemnly called, and appears not, or hath not ap-

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the plea amounted to the general issue (c), and that instead thereof the general issue ought to have been

peared, but makes or hath made default, and such defaults, according to the custom of the said city, be recorded against such person defendant, after such attachment made as aforesaid, such plaintiff in such bill original named, at every such four courts, in his proper person or by his attorney appearing, and offering himself against such defendant in the plea in such bill original, specified according to the custom of the said city, then at the last of such four courts, or at any court held or to be holden as aforesaid after such four defaults recorded as aforesaid, at the petition of such plaintiff in such bill original named, made to the said court, it is and hath been used for the said court to command such or any other serjeant at mace and minister of the said court, to warn such other person, according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen for the time being as aforesaid, to shew if any thing he hath or knows of to say for himself, why such plaintiff in such bill original named ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant at mace return, and certify to the same court such other person, in whose hands such sum of money is or hath been attached as aforesaid, to be warned according to the custom of the said city, to be and appear in the same court to shew cause as aforesaid; and if such person so warned, being solemnly called at such court, doth not appear, or hath not appeared, but makes or hath made default, then it is, and time immemorial as aforesaid hath been used and accustomed for the said court to award, and such plaintiff to have, execution of such sum so attached as aforesaid, to satisfy such plaintiff's debts in such bill original specified, or so much thereof as such sum so attached extends or hath extended to satisfy, by sufficient pledges, to be found and given by such plaintiff in such bill original named in the same court, according to the custom of the same city, to restore to such defendant such sum of money so attached as aforesaid, if such defendant, within a year and a day from thence next ensuing, come, or hath come into the said court, holden as aforesaid, and disproves, or hath disproved or avoided the said debt on the said bill original contained, according to the custom of the said city from time immemorial as aforesaid used and approved; and that after such pledges found, and execution had of such sum so in the hands and custody of such other person, attached and defended by the plaintiff in such bill original named, such other person, in whose hands or custody such sum is or hath been attached as aforesaid, is and hath been discharged against such defendant, if the said sum so attached and had in execution as aforesaid, and such defendant in such original bill named, is and hath been discharged against such plaintiff of so much money of his debt in such bill original demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked nor disproved by such defendant, and of such sum of money so attached and defended and in execution, amounts not,

(c) Not objectionable on this ground. 2 Hen. Bla. 371. 1 Roll. Ab. 552.

pleaded ; and that no proper or decisive issue could be taken on the plea, &c. Joinder in demurrer.

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or hath not amounted to the whole sum of the debt in and by the said bill original demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the same court, is, and time immemorial as aforesaid hath been used and accustomed to have, process against such defendant, according to the custom of the said city, for the residue of his said debt by him in such bill original demanded ; and the said *B.* and *J.* further say, that the said custom and all other customs of the said city, obtained and used in the same city during all the time aforesaid, by authority of a parliament of *Richard the Second*, late king of *England*, &c. after the conquest, holden at *Westminster*, in the seventh year of his reign, were ratified and confirmed to the then mayor and commonalty and citizens of the said city, and their successors ; and the said *B.* and *J.* further say, that one *T. G.* and *J. A.* of *London*, merchants, before the day of exhibiting the bill of the said *C. A.* and *J.*, to wit, on the sixteenth day of *July*, in the nineteenth year of the reign of his present majesty, in their own proper persons, came into the king's majesty's court, holden before *S. P.* esquire, then mayor of the said city of *London*, and the then aldermen of the said city, in the said Chamber of the Guildhall of the said city, situate in the parish of *St. Lawrence, Jewry*, in the ward of *Cheap, London*, aforesaid, according to the custom of the said city, and then and there in the same court, by the names of *T. G.* and *J. A.* affirmed a certain bill original against the widow of *C. T.* and *M.* in a plea of debt upon demand, of six hundred pounds of lawful money of *Great Britain* ; in the tenor of which said bill original follows in these words, that is to say, *T. G.* and *J. A.* by *W. N.* their attorney demand, against the widow of *C. T.* and *M.*, six hundred pounds of lawful money of *Great Britain*, which they owe to, and detain from, the said plaintiffs : For that whereas on the fifteenth day of *July*, in the nineteenth year of the reign of our sovereign lord king *George the Third*, at the parish of *Saint Helen, London*, the said defendants, for and in consideration of divers sums of money before that time due and owing from the said defendants to the said plaintiffs, and then in arrear and unpaid, granted and agreed to pay to the said plaintiffs the six hundred pounds above demanded, where and when the same should afterwards be demanded ; yet notwithstanding the said defendants, although often thereto requested, have not, nor hath either of them yet paid the said plaintiffs, or either of them, the said six hundred pounds above demanded, or any part thereof, to the damage of the said plaintiffs of twenty shillings, and therefore they bring this suit, &c. And the said *T.* and *J.* then and there in the same court, according to the custom of the said city, found pledges to prosecute their said original bill, to wit, *J. D.* and *R. R.*, and then and there appointed in their stead *W. N.* their attorney, against the said widow of *C. T.* and *M.* in and upon the said plea of the said bill original, according to the custom of the said city, &c. and by their said attorney then and there also prayed process to be thereupon made to them against the said widow of *C. T.* and *M.*, according to the

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Darrell, for the plaintiff. The custom pleaded is no bar. It is not stated in the plea, that the defendants

custom of the said city, and it was then and there granted to them, &c. Whereupon upon the petition of the said *T.* and *J.*, made to the said court by their said attorney, and by virtue of the said bill original, it was commanded by the said court to one *L. P.*, one of the said serjeants at mace of the said mayor and aldermen, and a minister of the said court, that he, according to the custom of the said city, should summon by good summoners the said widow of *C. T.* and *M.* to be and appear at the same court, holden before the said mayor and aldermen as aforesaid, on the said sixteenth day of July, in the said nineteenth year of the reign of our Sovereign Lord King George the third, to answer to the said *T.* and *J.* of and in the plea in the said bill original specified, and that day was then and there given by the said court to the said *T.* and *J.*, in the same plea, &c. whereupon afterwards, to wit, on the same day at the same court, the said serjeant at mace and minister of the same court, according to the custom of the said city, returned and certified to the same court that the said widow of *C. T.* and *M.* had nothing within the liberties of the said city, by which or whereby they could be summoned, nor were they, or was either of them to be found within the said city, and thereupon the said widow of *C. T.* and *M.* were then and there solemnly called, and did not, nor did either of them appear, but made default; and thereupon afterwards, to wit, on the same day at the same court, it was testified and notified to the same court, by the same *T.* and *J.*, that the said *B.* and *J.* were then indebted to the said widow of *C. T.* and *M.* in the sum of seventy-nine pounds and ninepence, which they in their hands and custody then had, and from the said widow of *C. T.* and *M.* detained; and the same *T.* and *J.* then and there by their said attorney, prayed the same court to command the said serjeant at mace and minister of the same court, according to the custom of the said city, to attach the said widow of *C. T.* and *M.*, by the said seventy-nine pounds and ninepence, then being in the hands and custody of the said *B.* and *J.* to defend, according to the custom of the said city, so that the said widow of *C. T.* and *M.* might be at the next court of his said Majesty, to be holden before the said mayor and aldermen, in the said chamber of the Guildhall of the said city, according to the custom of the same city, to answer to the said *T.* and *J.* of and in the plea in the said original bill specified; whereupon, at the petition of the said *T.* and *J.*, by their attorney aforesaid, to the same court, it was commanded as aforesaid by the same court to the said serjeant at mace and minister of the said court, that he, according to the custom of the said city, should attach the said widow of *C. T.* and *M.* by the said seventy-nine pounds and ninepence, being in the hands and custody of the said *B.* and *J.*, and the same seventy-nine pounds and ninepence in the hands and custody of the said *B.* and *J.* should defend, according to the custom of the aforesaid city, so that the said widow of *C. T.* and *M.* might be at the next court of his said Majesty, to be holden before the said mayor and aldermen on the seventeenth day of July, in the said nineteenth year of his said present

in this action were within the jurisdiction of the Court, or that the defendants in the action in the mayor's

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Majesty's reign, according to the custom of the said city, to answer to the said *T. and J.* of and in the plea in their said bill original specified; and that the said serjeant at mace should then certify to the said court what he should do by virtue of the said precept; and the same day was then and there given by the same court to the said *T. and J.* in the said plea, at which day, to wit, on the said seventh day of *July*, in the said nineteenth year of the reign of his said present Majesty, at the said next court of his said Majesty, holden before the said mayor and aldermen, in the said chamber of the Guildhall of the said city of *London*, according to the custom of the said city, the said *T. and J.*, by their said attorney came and appeared, &c., and the said serjeant at mace then and there returned and certified to the same court that he, according to the custom of the said city, on the said sixteenth day of *April*, in the nineteenth year of the reign of his said present Majesty aforesaid, between the hours of one and five in the afternoon of the same day, by virtue of the said precept, had attached the said widow of *C. T. and M.* by the said seventy-nine pounds and ninepence, then being in the hands and custody of the said *B. and J.* according to the custom of the said city, and the same seventy-nine pounds and nine-pence, so being in the hands and custody of the said *B. and J.*, had defended, according to the custom of the said city, so that the said widow of *C. T. and M.* might be then and there at the said court, to answer the said *T. and J.* of and in the plea in their said original bill specified, as before commanded; whereupon in the same court of his said Majesty, then holden before the said mayor and aldermen, in the said chamber of the Guildhall of the said city, on the said seventeenth day of *April*, in the said nineteenth year of his present Majesty, according to the custom of the said city, the said *T. and J.* by their said attorney, offered themselves against the said widow of *C. T. and M.* in the said plea in the said original bill specified, according to the custom of the said city; and the said widow of *C. T. and M.*, at the petition of the said *T. and J.* by their said attorney, then and there made at the same court, were solemnly called and did not appear, but then and there made the first default, which said default was recorded upon the said widow of *C. T. and M.* at that court, in the said plea in the said original bill specified, according to the said custom of the said city. And thereupon, according to the custom of the said city, a day was then and there given by the same court to the said widow of *C. T. and M.*, until the next court of his present Majesty, to be holden before the said mayor and aldermen, in the said chamber of the said Guildhall of the said city, on the nineteenth day of *July*, in the said nineteenth year of the reign of his said present Majesty, according to the custom of the said city, and the same day was then and there given by the same court to the said *T. and J.* in the same plea, &c.; at which said next court of his said Majesty, holden before the said mayor and aldermen, in the said chamber of the Guildhall of the same city, on the said nineteenth day of *July*, in the said nineteenth year of the reign of his said present Majesty aforesaid

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court had notice of the custom, neither is it stated that they had notice of attachment. The case in *Bro. Ab. For.*

according to the custom of the said city, the said *T.* and *J.* by their afore-said attorney appeared, and then and there in the said court offered themselves against the said widow of *C. T.* and *M.*, of and in the said plea in the said original bill specified, according to the custom of the said city; and the said widow of *C. T.* and *M.*, at the petition of the said *T.* and *J.* then and there made in the same court, were solemnly called and did not appear, but then and there made a second default, which said second default was recorded upon the said widow of *C. T.* and *M.*, at the same court, in the said plea, in the said bill original specified, according to the custom of the said city; and thereupon, according to the custom of the said city, a day was then and there given by the same court to the said widow of *C. T.* and *M.*, until the next court of his present Majesty, to be holden before the said mayor and aldermen in the said chamber of the said Guildhall of the said city, on the twentieth day of *July*, in the said nineteenth year of the reign of his said present Majesty, according to the custom of the said city, and the same day was then and there given by the said Court to the said *T.* and *J.* in the same plea, &c. at which said next Court of his said present Majesty, holden before the said mayor and aldermen, in the said Chamber of Guildhall of the same city, on the said twentieth day of *July* in the said nineteenth year of the reign of his said present Majesty, according to the custom of the said city, the said *T.* and *J.* by their said attorney, appeared, and then and there, in the same Court, offered themselves against the said widow of *C. T.* and *M.* in the said plea in the said original bill specified according to the custom of the said city; and the said widow of *C. T.* and *M.* at the petition of the said *T.* and *J.* then and there made in the same Court, were solemnly called, and did not appear, but then and there made a third default, which said third default was recorded upon the said widow of *C. T.* and *M.* at the same Court, in the said plea in the said bill original specified, according to the custom of the said city; and thereupon, according to the custom of the said city, a day was then and there given by the same court to the said widow of *C. T.* and *M.* until the next court of his present Majesty, to be holden before the said mayor and aldermen, in the said chamber of the said Guildhall of the said city, on the twenty-second day of *July* in the said nineteenth year of the reign of his said present Majesty, according to the custom of the said city; and the same day was then and there given by the said court to the said *T.* and *J.* in the same plea, &c. at which said next court of his said Majesty, holden before the said mayor and aldermen, in the said chamber of the Guildhall of the same city, on the said twenty-second day of *July* in the said nineteenth year of the reign of his said present Majesty, according to the custom of the said city; the said *T.* and *J.* by their said attorney appeared, and then and there, in the same court, offered themselves against the said widow of *C. T.* and *M.* of and in the said plea in the said original bill specified, according to the custom of the said city; and the said widow of *C. T.* and *M.*, at the petition of the said

Attach. 557, pl. 3, pl. 4, is an authority to shew that the plea must state the party is within the jurisdiction; and

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T. and J. then and there made in the same court, were solemnly called, and did not appear, but then and there made a fourth default, which said fourth default was recorded upon the said widow of *C. T. and M.* at the same court in the said plea in the said bill original specified, according to the custom of the said city; and thereupon afterwards, and after the said fourth default recorded upon the said widow of *C. T. and M.* according to the custom of the said city, in form aforesaid, to wit, at the court of the said Lord the King, holden before the said mayor and aldermen, in the said chamber in the Guildhall of the said city, on the twenty-second day of *July*, in the said nineteenth year of the reign of his said present Majesty, at the petition of the said *T. and J.* made to the said court by their said then attorney, it was then and there, by the same court commanded to the said serjeant at mace, that he, according to the custom of the said city, should warn and make known to the said *B. and J.* to be and appear in the said court to be holden before the said mayor and aldermen, in the said chamber of the Guildhall of the said city, on *Monday*, the eleventh day of *October*, in the nineteenth year of the reign of our Sovereign Lord King *George* the Third, at ten in the forenoon, according to the custom of the said city, to shew cause, if any thing they had, why the said *T. and J.* should not have execution against them for the said sum of seventy-nine pounds and ninepence in monies numbered, theretofore attached in their hands as the proper monies of the said widow *C. T. and M.* and that the said serjeant at mace should then certify to the same court what he should do by virtue of the said precept, and the same day was then and there given by the same court to the said *T. and J.* to be there, &c. and on which said day, at the court of the said Lord the King, holden before the said mayor and aldermen, in the said chamber of the said Guildhall of the said city, according to the custom of the said city, on the eleventh day of *October* in the said nineteenth year of the reign of the said Lord the present King, the said *T. and J.* by their said attorney, came and appeared, and the said serjeant at mace then returned and certified to the said court, that he, by virtue of the said precept to him directed, had warned and made known to the said *B. and J.* to be and appear in the said court there to be holden, &c. to shew cause, as to him above was commanded; whereupon, at the petition of the said *T. and J.* made to the said court by their said attorney, the said *B. and J.* were then and there solemnly demanded, and did not appear, but made default; and thereupon the said *T. and J.* by their said attorney, then and there, in the same court, according to the custom of the said city, prayed execution of the said seventy-nine pounds and ninepence, so attached in the hands and custody of the said *B. and J.* as aforesaid, to be adjudged to him, according to the custom of the said city, &c. Therefore, on the said eleventh day of *October* in the said nineteenth year of the reign of his said present Majesty, at the same court then and there held, according to the custom of the said city, it was considered by the said court, that the said *T. and J.* should have execution of the said seventy-nine pounds and ninepence, in mo-

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the cases in *Lutw.* 979. *Rol. Ab.* 554, pl. 3 and 4. *Lutw.* 208, are to the same effect (d). The case in 3 *Wilson's*

nics numbered, so attached as aforesaid, by two sufficient pledges, to be found and given by them the said *T.* and *J.* in the same court, according to the custom of the said city, to restore to the said widow *C. T.* and *M.* the said seventy-nine pounds and ninepence so attached, if they the said widow *C. T.* and *M.* within one year and one day then next ensuing, according to the custom of the said city, should come into the said court and disprove or avoid the said debt, in and by the said original bill of the said *T.* and *J.* demanded, and that the said *T.* and *J.* should have process against the said widow *C. T.* and *M.* for the residue of the said debt in the said bill original specified, &c. and thereupon the said *T.* and *J.* at that court, holden before the said mayor and aldermen, in the said chamber of the Guildhall of the said city, of the said eleventh day of *October* in the said nineteenth year of the reign of his said present Majesty, according to the tenor of the said judgment, and the custom of the said city, found sufficient pledges, to wit, *T. T.* and *G. M.* citizens of the said city, to restore the said widow *C. T.* and *M.* the said seventy-nine pounds and ninepence, so attached as aforesaid, if the said widow *C. T.* and *M.* should, within a year and a day then next ensuing, come into the said court and disprove or avoid the said debt in and by the said bill original demanded, according to the custom of the said city; and thereupon the said *T. G.* and *J.* in the same court, and by the consideration of the same court, according to the tenor of the said judgment, and the custom of the said city, had execution for the said seventy-nine pounds and ninepence, so attached as aforesaid, and thereof in the same court acknowledged to be satisfied, &c. as by the record and process thereof remaining in his said Majesty's court, holden before the said mayor and aldermen, in the said chamber of the Guildhall of the said city, more fully appears; and the said *B.* and *J.* further in fact say, that the said seventy-nine pounds and ninepence, so attached in their hands, and in execution had at the suit of the said *T. G.* and *J.* according to the custom of the said city, and the same seventy-nine pounds and ninepence, parcel of the said several sums of money in the said several promises and undertakings in the said declaration of the said *C. A. T.* widow, and *J. B. M.* above mentioned, are one and the same sum of money, and not other or different sums. And the said *B.* and *J.* in the said original bill and attachment mentioned, and the said *B.* and *J.* in the said declaration above named, are the same persons, and not other or different persons; and also, that the said widow of *C. T.* and *M.* named defendants in the said original bill, prosecuted at the suit of the said *T. G.* and *J.*, and the said *C. A. T.*, widow, and *J. B. M.* named plaintiffs in the above declaration, are the same persons, and not other or different; and that the said judgment and execution still remain in full force and effect, in no wise disproved or revoked by the said *C. A. T.*

(d) See also 2 *H. Bl.* 82. 6 *T. R.* 760. 1 *Vent.* 236. *Co. Dig.* Foreign Attachment, &c. 3 *Lcv.* 23. 1 *Saund.* 67, note 1, and 73 and 47, note 1. 1 *T. R.* 151. 6 *Mod.* 223. *Salk.* 73, 491.

Rep. 302, decides that the party ought to have had notice of the custom, and of the attachment issued. If the defendant in the original action has no notice of the custom, the plaintiff might collude with any debtor of defendant, to charge him with supposed debt; for after a year defendant cannot be admitted to overreach the judgment in attachment.

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Davenport, for defendant. The garnishee and the property must necessarily be in the city, otherwise the whole proceedings would be nugatory. It is not usual to give the notice contended for by the plaintiff. The customs of *London* are confined by act of parliament; therefore, if this be the custom, the act makes it good. The intention of the custom is, to enable all to proceed against the property of the defendant, where his person is not to be come at. If there is no collusion between the plaintiff and the defendant's debtor, the defendant cannot be hurt. The plaintiff is bound to prove his debt, *Lord Raym.* 727; and if so, there can be no collusion. There is also a year and a day for defendant to overreach the judgment, if fraudulent. If there was any apprehension of fraud, they might have replied to the collusion, instead of demurring. He cited *Show.* 506.

SED PER CURIAM. It ought to appear, that the garnishee is within the city, and the custom should be so stated. If there are specific goods attached, they must be within the city.

The defendant had leave to amend.

widow, and *J. B. M.*; and this the said *B. J.* are ready to verify: wherefore they pray judgment, if the said *C. A. T.*, widow, and *J. B. M.* ought to have their aforesaid action thereof maintained against them, &c.

1782.

HILTON, *Administratrix* of HENRY WILTON,
against JOHN WORRALL.

Trinity Term.

A debt depending upon a contingency, at the time of a party's discharge under insolvent act, 18 Geo. 3. c. 52. is not thereby discharged (a).

DECLARATION in debt on common money bond, dated 24th *January*, 1777, given by defendant to *H. Wilton*, deceased, for 200*l*.

Plea, that defendant was discharged under insolvent act, 18 Geo. III.

Replication, that the bond was subject to the following condition, viz.—

“The condition of the above written obligation is such, that whereas the above named *H. H.* hath on the day of the date above written, lent unto the above bound *P. C. P.* the sum of one hundred pounds, upon the merchandises and effects laden or to be laden on board the good ship or vessel called the *Ceres*, of the burthen of five hundred tons, or thereabouts, now in the river of *Thames*, whereof *T. N.* is commander; if the said ship or vessel do and shall with all convenient speed, proceed and sail from out of the said river of *Thames* on a voyage to any ports or places in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, and from thence do and shall sail and return into the said river of *Thames*, at and before the end and expiration of thirty-six calendar months, to be accounted from the day of the date above written, and that without deviation (the dangers and casualties of the seas excepted); and if the above-bounden

(a) This statute has now expired. The principle of this decision may however be applicable to cases on subsequent acts. The chief insolvent acts in force, are the 32 Geo. 3. c. 28, sess. 13; 1 Geo. 4, c. 119; and 3 Geo. 4, c. 144. See the 10th section of the 1 Geo. 4.

P. C. P., *J. W.* and *J. W.*, they or each of them, or each of their heirs, executors, or administrators, do and shall within thirty days next after the said ship or vessel shall be arrived in the said river of *Thames* from the said voyage, or at the end or expiration of the said thirty-six calendar months, to be accounted as aforesaid (which of the said times shall first and next happen), well and truly pay, or cause to be paid unto the above-named *H. H.*, his heirs, executors, administrators, or assigns, the sum of one hundred and twenty-two pounds of lawful money of *Great Britain*, together with one pound two shillings of like money, by the calendar month, and so proportionably for a greater or lesser time than a calendar month, for all such time, and as many calendar months as shall be elapsed and run out of the said thirty-six calendar months, over and above twenty calendar months, to be accounted from the day of the date above written; or if in the said voyage, and within the said thirty-six calendar months, to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, men of war, or any other casualties, shall unavoidably happen, and the above-bound *P. C. P.*, *J. W.* and *J. W.*, they, or their heirs, executors, or administrators, do and shall within six months next after such loss, pay and satisfy to the said *H. H.*, his heirs, executors, administrators, or assigns, a just and proportionable average on all the goods and effects which the said *P. C. P.* carried from *England* on board the said ship or vessel, and all other the goods and effects of the said *P. C. P.* which he shall acquire during the said voyage, and which shall not be unavoidably lost; then the above-written obligation to be void and of no effect, or else to stand in full force and virtue, to wit, at *London* aforesaid, in the parish and ward aforesaid.” The replication then averred that the ship sailed, but did not return into the river *Thames* until after defend-

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ant was discharged under the insolvent act; and stating breach of condition, in the nonpayment of the 122*l.*, &c. after such arrival. *Rejoinder*, admitting the breach of the condition, but averring that the bond and condition were entered into before defendant's discharge, and that therefore defendant is not liable. To this rejoinder, the plaintiff demurred generally, and the defendant joined in demurrer.

Wood, for plaintiff. The question here is, whether this debt was discharged by the insolvent act. It clearly was a contingent debt on the day the defendant was discharged. If the ship had been lost, no debt would have arisen. The words in the insolvent act, 18 *Geo.* III. c. 52, are, that the party is not to be imprisoned for any debt "owing, occasioned, or growing due," &c. and the meaning is only to extend to cases which are *debita in presenti solvenda in futuro*. This case is not of that description. By the bankrupt laws it could not have been proved as a debt under the commission (*b*).

Morgan, for defendant. This case will depend on the words of the act. The plaintiff might have come in for his debt under the distribution; and I should think he might have proved it under a commission of bankruptcy.

PER CURIAM. This is no *debt* at all till the event has happened. There must be judgment for plaintiff.
Judgment for plaintiff.

¹6; See 3 T. R. 435. 5 *Maule and Selw.* 21. 2 *Stark.* 186, 5 *B. and A.* 12.

COOPER *against* WATLINGTON.

1784.

Easter Term.

DECLARATION on an indenture of partnership, made the 26th September, 1774, between plaintiff and defendant, for continuing a partnership for the term of 11 years, subject, amongst others, to the following proviso: "that is to say, it was mutually agreed upon by and between the said parties, and declared to be the true intent and meaning of the said indenture, that if either of the said parties should be minded and desirous of quitting the said art or mystery at any time during the said term of eleven years; and should for that purpose give six months notice in writing of such his intention to the other of the said parties; that then, at the end of the said term of six months, whereof notice should be given as aforesaid, the said co-partnership should cease and determine in such manner and form as if the said term of eleven years had been fully elapsed; and that the party receiving such notice should, after the end of the said six months, continue the said trade and business on his own account, and have the benefit of the remaining part of the lease of the said premises."—Amongst others, the plaintiff declared on the following breach: that although he the said plaintiff was willing and desirous to have continued a co-partner and joint trader with the said defendant, in the said art, trade, or mystery, for, during, and until the end and expiration of the said term of eleven years in the said indenture in that behalf mentioned; and although the said defendant did not during the said term quit the said art, trade, or mystery; yet the said defendant did not continue a co-partner and joint trader with the said plaintiff in the said art, trade, or mystery, until the end and term of eleven years, in the said indenture mentioned, but wholly refused so to do; and on the

If an indenture of partnership for a term of years contains a proviso, that either party may, if he be desirous of quitting the trade, determine the partnership, by giving six months notice, he cannot dissolve the partnership and then set up a trade elsewhere; but must either continue the partnership, or entirely give up such trade.

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contrary thereof, during the said term, to wit, on the twenty-fifth day of *March*, one thousand, seven hundred and eighty-four, at *London* aforesaid, in the parish and ward aforesaid, withdrew and separated himself from being a co-partner and joint trader with the said plaintiff in the said art, trade, or mystery, and hath altogether refused to continue a co-partner and joint trader with the said plaintiff, and hath ever since that time carried on the said art or mystery separate and apart from the said plaintiff, to wit, at *London* aforesaid, in the parish and ward aforesaid, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant, in that behalf made as aforesaid.

To this breach the defendant pleaded as follows :
“and as to the said supposed breach of covenant in the said declaration first above assigned ; this defendant saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because he saith that, during the continuance of the said partnership in the said indenture mentioned, and six months before the said twenty-fifth day of *March*, in the year of our Lord one thousand seven hundred and eighty-four, aforesaid ; to wit, on the twenty-sixth day of *September*, in the said year of our Lord one thousand seven hundred and eighty-three, at *London* aforesaid, in the parish and ward aforesaid, he the said defendant did give notice in writing to the said plaintiff, that he the said *S.* was minded and desirous to quit and determine the said co-partnership in the said art, trade, or mystery, in the said indenture mentioned, at the end of six months from that time, that is to say, on the said twenty-fifth day of *March*, in the said year of our Lord one thousand seven hundred and eighty-four, according to the form and effect of the said indenture ; and the said defendant says,

that he did not, until the end and expiration of six months from the giving of such notice as aforesaid, withdraw or separate himself from being a co-partner and joint trader with the said plaintiff in the said art, trade, or mystery, in the said indenture mentioned, and this the said S. is ready to verify ; wherefore he prays judgment whether the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

1784.

COOPER
against
WATLINGTON.

Demurrer, and joinder in demurrer.

Bower, for the plaintiff. The ground of demurrer is that the defendant has not averred in his plea that he was minded of leaving off the trade, according to the proviso. It was the intention of the parties that the partnership should continue till the end of the term, unless either of the parties was minded absolutely to leave off trading. Otherwise the partners might be trying to undermine each other, and withdraw and take away customers.

Wood, contra. This is a very uncommon stipulation ; if such was the intention of the parties, as contended for by the plaintiff, they would certainly have expressed it in clearer words.

SED PER CURIAM. The words cannot well receive any other construction than that put upon them by the plaintiff. They were certainly meant to exclude either party from setting up a trade elsewhere.

Judgment for plaintiff.

1784.

Easter Term.

ROBERTSON and another, Assignees of COTTRELL, a Bankrupt, against Sir ROBERT TAYLOR, Bart. and another, late Sheriffs of London.

The jury, in an action of debt for an escape of a person in execution, must give a verdict for the whole debt (a).

THIS was a special case for the opinion of the court; and stated, that the proceedings were in an action of debt for an escape upon a *ca. sa.* for 73*l.*, issued against *John Farquhar* at the suit of the bankrupt, and directed to the above defendants as sheriffs.

The cause came on to be tried the sitting after *Hilary Term*, 1784, at *Guildhall*, before the Right Honourable the Earl of *Mansfield*, when the jury found a verdict for the plaintiffs, damages one shilling, and costs forty shillings; upon which the following question for the opinion of the court was reserved: whether upon the proceedings, it was in the power of the jury to ascertain the damages to be recovered by the plaintiff; if the court shall be of opinion that it was in the power of the jury to ascertain the damages to be recovered by the plaintiffs, then the plaintiffs were to recover no more than one shilling damages, and the costs to be taxed: but if the court should be of opinion that it was not in the power of the jury to ascertain the damages to be recovered, then the plaintiffs were to be entitled to recover of the defendants the debt owing by *John*

(a) 1 *Saund.* 35, n. 1. 2 T. R. 129, the statutes *Westminster* 2. and 1 *Rich.* 2, c. 12, give this action of debt against the sheriff or goaler, for an escape of a prisoner out of execution. The plaintiff may, however, still bring an action on the case for the escape, *Cro. Jac.* 288, though debt is the preferable form of action for the above. When the escape is out of custody upon *mesne process*, then case is the proper form of action, and debt will not lie. 2 *Inst.* 382. In such action for an escape on *mesne process*, the amount of damages is in the discretion of the jury.

Farquhar, in the declaration mentioned, besides their costs, to be taxed.

1784.

ROBERTSON
and another
against
TAYLOR
and another.

Baldwin, for the plaintiff. The question is, whether in an action of debt for an escape of a person in execution, a jury can give less than the debt. The case in 2 *Blackstone's Reports*, 1048, is directly in point, that the whole must be recovered, or nothing.

Mingay, for the defendant. I can find no case to contradict this authority.

Judgment for plaintiff.

BENNETT *against* JOHNSON.

1784.

Easter Term.

THIS was a special case for the opinion of the court, stating as follows. "This was an action of trover for a quantity of silk and wearing apparel: the cause came on to be tried at the sitting after *Hilary Term*, 1784, at Westminster Hall, before the Right Honourable the Earl of *Mansfield*, when the jury found a verdict for the plaintiff, damages one shilling, and costs forty shillings, subject to the opinion of the court on the following case: that the plaintiff was in use to send silk to the defendant to be dyed; there was due from the plaintiff to the defendant 17s. 2d. for dying: the plaintiff sent the silk in question to be dyed, that it was dyed, and that 3s. 6d. was due to the defendant for dying it; that the plain-

A dyer has a lien upon an article delivered to him to be dyed, only for the particular price of dying that article, and not for his general balance (a).

(a) The same point was ruled, in 4 *Burr.* 2214. And see *Whitaker's Law of Lien*, 100, n. b. 6 *East*, 523, note e. 7 *East*, 229. But dyers, or other traders, may make a stipulation that they will not receive any more goods to be dyed, &c. &c., but on condition that they should respectively have a lien on those goods for their general balance; and any one who after notice of such stipulation delivers goods to either of these persons, must be taken to have assented to it, and consequently cannot demand goods so delivered to any such dyer, &c. without paying the balance of his general account. 6 *Term Rep.* 14. See also 3 *Bos.* and *Pul.* 42, 498. 6 *East*, 519.

1784.

BENNETT
against
JOHNSON.

till tendered the 3s. 6d. and demanded the silk, which the defendant refused to deliver, unless he was paid the 17s. 2d. also. The question for the opinion of the court is, whether the plaintiff is entitled to recover in this action? If the court shall be of opinion that the plaintiff is entitled to recover, then the verdict to stand, and the defendant is to deliver the goods in question to the plaintiff, on oath; but if the court shall be of opinion that the plaintiff is not entitled to recover, then a verdict to be entered for the defendant."

Mingay, for the plaintiff. The case of *Green v. Palmer*, 4 Burr. 2214, where the doctrine of liens is very ably and fully discussed, is in point. There can be no right to retain for a general balance, without a usage to that effect. The principles of public policy, for the convenience of commerce, are against a contrary doctrine. The plaintiff can only retain for the sum due for the dying or manufacturing the thing detained.

The court admitted the doctrine and law laid down by *Mingay*, and gave

Judgment for plaintiff.

1785.

Hilary Term.

SEWART against DENTON, Administratrix of JOHN DENTON.

A legatee, under a bequest of wines, which arrived in the port of London in a ship before the death of testator, the report of the arrival of the

ship being made before, but the entry of the wines not being made until after the death of testator, is not subject to the payment of the duties, the executor being bound to pay them out of the assets.

THIS was a special case for the opinion of the Court, stating as follows :

"This action was brought against defendant, as administratrix of *J. D.* for money paid, laid out, and expended by the plaintiff, to and for the use of the

said *J. D.* in his life time, and for money had and received by the said *J. D.* in his life time, to and for the use of the plaintiff. The defendant pleaded the general issue, *non assumpsit*, whereupon issue was joined. This cause came on to be tried at the sitting after *Michaelmas Term, 1784*, at *Guildhall, London*, before the Right Hon. the Earl of *Mansfield*, &c. when the jury found a verdict for the plaintiff, damages *199l. 13s 6d.*, and *40s.* costs, subject to the opinion of the Court on the following case: That *P. T.* by his will, dated *14th October, 1779*, willed, that the plaintiff and *J. D.*, (to whom the defendant is administratrix,) should have and carry on his trade or business of a wine merchant, as joint and equal partners; and he gave and bequeathed unto the said *T. S.* and *J. D.* all his stock in trade of wines and spirituous liquors which he should be possessed of at the time of his decease; and after giving several pecuniary legacies, he gave and bequeathed unto the plaintiff and *C.* his wife (who is since dead), all the rest, residue, and remainder of his monies, goods, chattels, estates and effects whatsoever or wheresoever, whereof he should die possessed, or whercof any other person or persons should be possessed in trust for him at his death; and he appointed *E. A.* the plaintiff, and *T. J.* his executors. The testator died on the *23d January, 1780*. That on the *22d January, 1780*, eighteen pipes of wine, which had been ordered by the testator, arrived in the port of *London*, and the arrival of the ships on board which the wines were laden, were reported before his death, but the wines in question were not entered or delivered until after the testator's death. That the plaintiff paid the freight, duties, and insurance, amounting to *399l. 7s. 1d.* upon the whole of the wines, without prejudice to the question, whether the same should be paid by the specific legatees of the testator's stock in trade, or by the residuary legatees in the testator's will.

1785.

SEWART
against
DENTON,
Administratrix
of DENTON.

1785.

SEWAERT
against
DENTON,
Administratrix
of DENTON.

The question for the opinion of the court was, whether the freight, duties, and insurance, were payable by the plaintiff and the other specific legatees in equal proportions, or whether the same were payable by the executors out of the testator's estate. If the Court shall be of opinion that they ought to be paid by the specific legatees, then a verdict to be entered for the plaintiff, damages 199*l.* 13*s.* 6*d.* and costs; but if the court shall be of opinion that they were payable by the executors out of the testator's estate, then a verdict to be entered for the defendant.

Baldwin, for the plaintiff. The question is, whether the goods should have been delivered to the intestate free from these charges. Every owner of a ship has a lien for freight and duties, and the plaintiff was compelled to pay them. They did not become due until after the testator's death, for the report had nothing to do with the entry of the goods; and until the entry is made, no duties become due. The report is only notice to the Custom-house that the ship is arrived, and it is made by the captain. The entry is made by the owner of the goods. The executor was not bound to make the entry. By a bequest, the legatee takes the thing bequeathed, with all charges.

Mingay, for defendant. I contend, that under the 18 *Car.* 2 (*a*), the moment the ship arrived in port the wine was liable to the duties—a *fortiori*, as soon as the arrival is reported. The practice is, that the consignee should make the entry, 5 *Geo.* I. c. 11; and therefore, when the testator left these wines to his two nephews, he meant they should take the same clear of all charges.

LORD MANSFIELD. That certainly appears to have been his intention.

Judgment for defendant.

BIRD *against* Sir T. GUNSTON.

1785.

April

DECLARATION in trespass, for seizing a cart and horses, and divers quantities of beer, and detaining them. Plea, general issue, not guilty. The cause was tried at *Taunton* Assizes, before Sir *Beau-mont Hotham*, Baron, and Mr. Justice *Buller*. A verdict was found for the plaintiff, damages 10s. and costs 40s. subject to the opinion of the Court on the following case :—

A magistrate is entitled to notice of action under the 24 *Geo. 2*, c. 44, s. 1, when he acts as a magistrate, though what he does is not strictly within the scope of his office (a).

The plaintiff's waggon, with two horses thereto, were in the turnpike road at the time that the defendant stopped them; but the waggon was then standing still, and the waggoner was fastening the casks contained in the waggon. The defendant, who was a Justice of the Peace, stopped the waggon and horses, with intent to convict the driver of the waggon in the penalty of 10s. under the statute of 13 *Geo. III.* ch. 78 (b); and the waggon and horses were detained till the next day.

(a) See *Tidd*, 7th ed. 27. S. C. and 9 *East*, 365. 3 *Camp.* 242. 3 *Moule and Selw.* 580. 2 *Price*, 126. 2 *H. Bla.* 114. *Holt. C. N. P.* 458. And as to the form of the notice, see *Tidd*, 7th ed. 27, 8.

(b) Sec. 61, by which it is enacted, that if the driver of any cart, dray, or waggon, shall ride upon such carriage in any street or highway, not having some other person on foot or on horseback to guide the same (such carriages as are conducted by some person holding the reins of the horse, excepted); or if the driver of any carriage whatever on any part of any street or highway, shall, by negligence or misbehaviour, cause any damage to any person or carriage passing upon such street, &c. or shall quit the highway and go on the other side of the hedge or fence inclosing the same, or wilfully be at such distance from such carriage, whilst it shall be passing upon such highway, that he cannot have the direction of the horses drawing the same, or shall by negligence or misbehaviour prevent or interrupt the free passage of any other carriage or person on the highways; or if the driver of any empty waggon, cart, or carriage, shall neglect to turn aside for any coach, chariot, chaise, loaded waggon, cart, or other loaded carriage, or if any person shall act as the driver of any such coach, post-chaise, or carriage, let for hire, or waggon, wain, or

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 against
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No notice was given to the defendant previous to the time of bringing the action (c). The question was, whether the action could be maintained without notice of action having been given.

Gibbs, for plaintiff, contended that notice was not necessary. The act of the defendant was not done in execution of his office. He was not acting as a Justice. The act gives no authority to convict any person who is not riding in his cart. Here the plaintiff was standing still.

cart, not having the owner's name, as before required, painted thereon, or shall refuse to discover the true Christian and surname of the owner ; such driver, convicted of such offences, either by his own confession, the view of a justice, or by the oath of one witness before any justice for limit where such offence committed, shall, for every offence, forfeit not exceeding ten shillings, in case such driver shall not be owner ; and in case the offender be owner of such carriage, then not exceeding twenty shillings ; and in either of such cases shall, in default of payment, be committed to the house of correction for not exceeding one month, unless the same be sooner paid ; and every driver offending in either of such cases, shall, by authority of this act, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be immediately delivered to a constable or peace officer, to be conveyed before some justice ; and if such driver, in any such cases, shall refuse to discover his name, the justice of peace before whom taken, or to whom any such complaint is made, may commit him to the house of correction for not exceeding three months, or may proceed against him for the penalty, by a description of his person and the offence, and expressing in such proceedings that he refused to discover his name.

(c) By the statute 24 Geo. 2, c. 44, s. 1, it is enacted, that no writ shall be sued out against, nor any copies of any process, at the suit of a subject, shall be served on any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same ; in which notice shall be clearly and explicitly contained the cause of action which such party hath, or claimeth to have, against such justice of the peace ; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode, who shall be entitled to have the fee of twenty shillings for the preparing and serving such notice, and no more.

SEN PER CURIAM. When the Justice thinks he is acting in execution of his office, he is protected, otherwise the act would be nugatory : for a man needs no protection who acts strictly right. It is to give him the liberty of tendering amends when he finds he has made a mistake, that the statute requires a notice.

Judgment for Defendant.

1785.

BIRD
against
GUNTER.

MACKAY *executor of Durno, against MACKRETH, administrator of Sir JOHN SHELLEY, deceased, assignee of his Father, Sir JOHN SHELLEY, also deceased.*

1785.

Mich. Term.

DECLARATION in covenant, reciting that by a certain indenture made the 8th November, 1748, between the Hon. *T. H.* of the one part, and the aforesaid *J. D.* of the other part. The said *T. H.* for the considerations in the said indenture mentioned, did demise, lease, set, and to farm let unto the said *J. D.* (amongst other premises in the said indenture particularly mentioned and described), a certain messuage, &c. of him the said *T. H.* situate, &c. with the appurtenances, together also with the several goods, utensils, and things particularly mentioned, expressed, and contained in the schedule or inventory thereof thereunder written, to have and to hold the said messuage, &c. and premises so by the said indenture demised as aforesaid, with their and

A declaration in covenant at the suit of the executor of a termor, for a breach of covenant after the death of the termor, should state the termor's interest and title in the premises ; and where a declaration stated that A. B. demised premises to the testator of the plaintiff (*viz.* the termor, without stating that A. B. was seised in fee, or of any other estate), and that the plaintiff's testa-

tor demised them to C. D. and stated a breach of covenant after plaintiff's testator's death, it was held bad (*a*). Where a lessee has power to renew his term, upon giving six months notice of his intention, before its expiration, and upon his preparing a fresh lease, &c. he cannot, though he give notice of such his intention, demise the premises to another party beyond the expiration of the first term, unless he prepare such fresh lease, and get it, or endeavour to get it executed.

An executor of a lessor, tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death.

(*a*) 1 *Saund.* 112, n. 1 *Clift*, 121, 2.

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every of their appurtenances, unto the said *J. D.* his executors, administrators, and assigns, from the Feast St. Michael the Archangel, then last past, for and during the term of twenty one-years from thence next ensuing, and fully to be complete and ended, at and under certain rent and covenants in the said indenture mentioned. And the said *T. H.* did in and by the said indenture, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said *J. D.* his executors, administrators, and assigns, that (in case the said *J. D.* his executors, administrators, or assigns, or any of them, should be desirous of taking a further lease of the said premises by the said indenture demised, for a further term of twenty-one years, to commence upon the expiration of the said term of twenty-one years by the said indenture granted, and should signify his or their desire in writing at any time six months before the expiration of the said term of twenty-one years by the said indenture granted unto the said *T. H.* his executors, administrators, or assigns), he the said *T. H.* should and would, at such request, costs and charges of the said *J. D.* his executors, administrators, or assigns, demise and grant the said mesuage or dwelling house, tenements, outhouses, and all and singular other the premises by the said indenture demised, with the appurtenances, to him the said *J. D.*, his executors, administrators, and assigns, for a further term of twenty-one years, to commence from the expiration of the term of twenty-one years, by the said indenture granted, subject to the payment of such rent, and the performance of such covenants, as were and are in the said indenture mentioned and contained, on the part and behalf of the said *J. D.*, his executors, administrators, and assigns, to be paid, kept, and performed. He the said *J. D.*, his executors, administrators, or assigns, at the same time

executing a counterpart of such further lease (as by the said indenture, reference being thereto had, will amongst other things fully appear), by virtue of which said demise he the said *J. D.*, in his lifetime, to wit, on the said 8th day of *November*, in the year 1748, aforesaid, at *Westminster* aforesaid, in the said county of *Middlesex*, entered into and became and was possessed of the said messuage or dwelling-house and premises so to him demised as aforesaid for the said term of twenty-one years, in the said indenture mentioned, together with such right of renewal of the said term as aforesaid. And the said *J. M.* in fact further saith, that the said *J. D.* being so possessed of the premises for the said term, so to him thereof demised as aforesaid, and having such right of renewal of the said term as aforesaid, and being desirous of taking a further lease of the said premises by the said indenture demised to him as aforesaid, for a further term of twenty-one years, to commence upon the expiration of the said term of twenty-one years by the said indenture granted upon the terms in that respect specified and agreed upon in the said indenture, he the said *J. D.*, according to the terms of the said indenture, did, six months before the expiration of the said term, by the said indenture granted unto him the said *J. D.*, to wit, on the 25th day of *March*, in the year of our Lord, 1769, at *Westminster* aforesaid, in the said county of *Middlesex*, signify unto the said *T. H.*, such his the said *J. D.*'s desire, in writing, to have such further lease of the said premises so to him demised as aforesaid; and did require and demand such further lease of the said premises, according to the said right or power of renewal in the aforesaid indenture mentioned. And the said *J. M.* in fact further saith, that the said *J. D.* having such right to renewal of the said lease

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so to him granted as aforesaid, and having made such election to have the same renewed as aforesaid, and still desirous of such renewal, and being in possession of the said premises in virtue of his said right of renewal, he the said *J. D.* afterwards, to wit, on the 5th day of *September*, in the year of our Lord, 1770, at *Westminster* aforesaid, in the county of *Middlesex* aforesaid, by a certain indenture then and there made between him the said *J. D.* of the one part, and the said Sir *J. S.*, the father of the said *J. S.* hereinbefore mentioned, of the other part, (one part of which said last-mentioned indenture, sealed with the seal of the said Sir *J. S.*, the father, and bearing date the day and year last aforesaid, the said *J. M.* brings into court here) did for the considerations in the said last mentioned indenture contained, demise, set, and to farm let unto the said Sir *J. S.* the father, his executors, administrators, and assigns, the aforesaid messuage or dwelling-house, with the appurtenances, to have and to hold the same, with the appurtenances thereunto belonging, and the several matters and things contained in a certain schedule unto the said last mentioned indenture subjoined, unto the said Sir *J. S.* the father, his executors, administrators, and assigns, from the feast of the birth of our Lord Christ then last past, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended, subject nevertheless to a certain proviso in the said last-mentioned indenture contained, for vacating and determining the said last-mentioned demise at any of the times therein mentioned. Covenants by Sir *J. S.* the father, for payment of rent unto *J. D.*, and to keep and leave the premises in repair. Covenant by *J. D.* that Sir *J. S.* might determine the term at the expiration of the first seven, eleven, or fourteen years. As by the said last

mentioned indenture, reference, &c. By virtue of which said last mentioned demise, the said Sir J. S. the father, entered into the said several premises by the said last mentioned indenture demised as aforesaid, with the appurtenances, and became and was possessed thereof, under and by virtue of the said last mentioned indenture, for the said term so to him thereof demised as aforesaid. And afterwards, to wit, on the first of *January*, 1779, to wit, at, &c. aforesaid, all the estate, right, title, term of years then to come and unexpired, interest, property, profit, claim, or demand whatsoever, of the said Sir J. S. the father, of, in, to, or out of the said premises to him demised as aforesaid, with the appurtenances, by assignment thereof then and there legally made, came to and vested in the said Sir J. S. the son, by virtue whereof he the said Sir J. S. the son, in his life time, to wit, on, &c. last aforesaid, entered into the said premises with the appurtenances and became and was possessed thereof for the then residue of the said last mentioned term therein. Averment, that the said J. D. having such right of renewal of the said term of years as aforesaid, he the said J. D. continued entitled to such renewal of the said term, and afterwards in the life time of the said Sir J. S. the son, to wit, on the first of *February*, 1779, aforesaid, at, &c. aforesaid, died so entitled, having first duly made his last will and testament in writing, and thereof appointed the said plaintiff executor. Averment, that plaintiff took upon himself the execution of the will, and thereby then and there became and was possessed of and entitled unto the said right of renewal of the said term of twenty-one years, and all other the interest of the said J. D., of, in, and to the said premises so to him demised as aforesaid, with the appurtenances, at the time of his death, under the aforesaid indenture of lease thereof to him

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1785. the said *J. D.*, whereof the said Sir *J. S.* the son, afterwards, to wit, on, &c. aforesaid, had notice, to wit, at, &c. Averment that he the said plaintiff, being such executor to the said *J. D.* as aforesaid, and having such right of renewal of the said term as aforesaid, and the said Sir *J. S.* the son, being so possessed of the said premises so to him assigned as aforesaid, he the said Sir *J. S.*, the son, in pursuance of the power or agreement for that purpose, in the said indenture of lease to the said Sir *J. S.* the father mentioned, did, six calendar months before the end of the first fourteen years of the said term of twenty-one years so demised to the said Sir *J. S.* the father, as aforesaid, to wit, on the 19th of *June*, 1783, at, &c. aforesaid, give unto the said plaintiff, as such executor as aforesaid, notice in writing, that he the said Sir *J. S.* the son, should and would quit and deliver up possession of the said messuage or dwelling house by the said last mentioned indenture demised as aforesaid, and vacate the remaining part of the term thereby demised, at Christmas Day then next, according to the power and agreement for that purpose in the said last mentioned indenture contained. Averment, that the said Sir *J. S.* the son, having given such notice to determine the said last mentioned lease as aforesaid, the said defendant, as such administrator as aforesaid, did upon the said Christmas Day next, after giving the same as aforesaid, that is to say, upon the 25th of *December*, 1783, aforesaid, to wit, at, &c. aforesaid, quit and deliver up unto the said plaintiff, as such executor as aforesaid, the possession of the said premises so assigned to the said Sir *J. S.* the son, as aforesaid, and did then and there vacate and determine the said term of twenty-one years so thereof demised as aforesaid, as to the then remaining part of the said term, according to the tenor and effect of the aforesaid notice,

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and the proviso or agreement for that purpose in the said last mentioned indenture contained. Averment, that the said term for twenty-one years did thereupon accordingly cease, end, and determine; and although no further lease of the said premises so demised to the said *J. D.* as aforesaid, hath as yet been granted by the aforesaid *T. H.* yet he the said plaintiff, as such executor as aforesaid, is still entitled to the said renewal of the said term; and the said *J. D.* in his lifetime, from the time of the expiration of the said term of twenty-one years, so to him demised as aforesaid, and the said plaintiff, as such executor as aforesaid, since his death, have always continued and remained tenants to the said *T. H.* his executors, administrators, and assigns, of the aforesaid demised premises, under and in virtue of the said right of renewal, and of the said agreement for such further lease as aforesaid, to wit, at, &c. aforesaid. Averment of performance by the said *J. D.* in his lifetime, and the said plaintiff, since the death of the said *J. D.* of all things in second indenture mentioned, by them to be performed; yet protesting that the said Sir *J. S.* the son, in his lifetime, after the said premises by that indenture demised, so came to him by assignment as aforesaid, and the said defendant, administrator as aforesaid, after his death, did not, nor did either of them, perform or fulfil any thing in the said indenture contained, on the part and behalf of the said Sir *J. S.* the father, and his assigns, to be performed and fulfilled; in fact, the said plaintiff saith, that upon the said determination of the said demise, so made to the said Sir *J. S.* the father, as aforesaid, that is to say, upon, &c., at, &c. 21*l.* for rent, beginning after the aforesaid assignment, to the said Sir *J. S.* the son, became and were due and owing and payable, and still are in arrear and unpaid to the said plaintiff, as such executor as afore-

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said, contrary, &c. Averment, that the said Sir *J. S.* the son, did not, after the said premises so demised to his father as aforesaid, came to him the said Sir *J. S.* the son as aforesaid, repair and keep, and leave in repair, the premises, according to second indenture, but on the contrary thereof, the said Sir *J. S.* the son, in his life-time, after the said premises came to him by assignment as aforesaid; and the said defendant, administrator as aforesaid, after the death of the said Sir *J. S.* the son, to wit, on the first of *March*, 1779, as aforesaid, and from thence until the determination of the said term of twenty-one years, so demised to the said Sir *J. S.* the father, as aforesaid, suffered and permitted the said messuage or dwelling-house, with the appurtenances, to be greatly out of repair, &c.; and upon and at the aforesaid determination of the said term, so thereof demised to the said Sir *J. S.* the father, as aforesaid, he the said defendant, administrator, as aforesaid, left, surrendered, and yielded up the said premises unto him the said plaintiff, executor, as aforesaid, so out of repair, &c. contrary, &c. Second count. That whereas, before the making of the indenture hereinafter mentioned, to wit, on the 30th of *September*, 1769, at, &c. aforesaid, the said *T. H.*, hereinbefore mentioned, demised (amongst other premises) the said messuage and premises in the said indenture hereinafter mentioned, with the appurtenances, to the said *J. D.* deceased, his executors, administrators, and assigns, to hold the same unto the said *J. D.* his executors, administrators, and assigns, from, &c. for one year from thence next ensuing, and fully to be complete and ended, and so from year to year, for so long time as it should please the said *T. H.* and *J. D.* his executors, administrators, or assigns, by virtue of which said demise, he the said *J. D.* entered into the said premises so to him demised as last aforesaid, with the appurtenances, and became and was possessed thereof, and being so there-

Second count,
on which plain-
tiff obtained
judgment.

of possessed, by a certain other indenture, made at, &c. the said *J. D.* leased the premises to Sir *J. S.* the father, for twenty-one years. The count then set forth the covenants as those in first count, and stated the entry of the lessee, the death of the testator *J. D.* during the continuance of the first demise, having made his will, and thereby appointed the plaintiff his executor; that plaintiff proved the will, and thereby became possessed of the interest in the first demise; and then averring breaches after the death of plaintiff's testator, during the continuance of the first demise.

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Demurrer. For that it is not alleged, nor does it appear in or by the said first count of the said declaration, that the said *J. D.*, deceased, in his lifetime, had such an interest or estate of and in the premises in the said first count of the said declaration, stated to have been demised by him to the said Sir *J. S.* the father, therein also mentioned at the time of making the said indenture of demise in that behalf in that count also mentioned, as would or could by law, upon the death of the said *J. D.* vest in the said *J. M.*, as his executor, so as to enable him the said *J. M.* as such executor, to maintain any action of covenants upon breaches of covenants contained in that indenture: and also, for that it is not alleged, nor does it appear in or by the said first count of the said declaration, that the said *J. D.* deceased, in his lifetime, had such an interest or estate of and in the said premises in the said first count of the said declaration, mentioned to have been demised by him to the said Sir *J. S.*, the father, at the time of making the said demise therein mentioned, as would or could enable him by law to make such demise, as in the said first count of the said declaration mentioned; and also, for that it appears in and by the said first count of the said declaration, that the said indenture of demise, in that count mentioned to have been made between the said

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J. D., of the one part, and the said *Sir J. S.* of the other part, was void in law, inasmuch as the said *J. D.* thereby demised the said premises therein mentioned for a longer term than he the said *J. D.* was possessed or entitled unto in the same; and also, for that it is not alleged, nor does it appear in or by the said first count of the said declaration, that the said *J. D.* deceased, at the time of his death, had any estate, right, title, or interest in law whatsoever, of, in, or to the said demised premises in the said first count of the said declaration mentioned; and also, for that the said first count of the said declaration is argumentative in this, that the said *J. M.* hath, in and by his first count in his said declaration, shewn that he duly proved the will of the said *J. D.* and took upon himself the burthen of the execution thereof, and thereby became and was possessed of and intitled unto the said right of renewal therein mentioned, and all other the interest of the said *J. D.* of and in the said premises, with the appurtenances, without positively alleging or shewing that the said *J. D.* was, at the time of his death, possessed of such an estate or interest in law in the premises, as upon his death could by law vest in the said *J. M.* as his executor, for the purpose of enabling him the said *J. M.*, as executor as aforesaid, to maintain any action of covenant for the breaches in that count mentioned; and also, for that no material issue can be taken upon such argumentative pleading; and also, for that the said breach of covenant in the said first count first above assigned, is double, in this, viz. that it joins, and attempts to put in issue, two matters, to wit, what rent was due from *Sir J. S.* the son, in his lifetime, and also what was due from the said *R. M.* as administrator, as aforesaid, in the same breach; and also, that the said breach in the said first count severally above mentioned, is double, in this, that it joins two distinct matters, and attempts to put two distinct matters in issue, viz.

whether the said Sir *J. S.* the son, in his lifetime, repaired the said premises, or not; and also whether the said *R. M.* surrendered the same to the said *J. M.* properly repaired or not; and also, for that the said second breach is contradictory and absurd, in this, that it states that the said Sir *J. S.* the son, suffered and permitted the said premises to be out of repair until the determination of the said term. Whereas, it appears by that first count, that the said Sir *J. S.*, the son, was dead before the said determination of the said term; and also for that the said first count of the said declaration is in other respects insufficient, informal, and absurd, &c. And the said *R. M.*, administrator as aforesaid, as to the premises in the second count of the said declaration contained, says, that the said declaration in that respect, and the matter therein contained, are not sufficient in law to enable the said *J. M.* as executor as aforesaid, to have or maintain his said action against him the said *R. M.* as administrator as aforesaid, to which said declaration in that respect, in manner and form as the same is above made, he the said *R. M.* hath no need nor is he bound by the laws of this land in any manner to answer; and this he is ready to verify: wherefore, for want of a sufficient declaration in this respect, the said *R. M.*, administrator as aforesaid, prays judgment, if the said *J. M.* as executor as aforesaid, ought to have or maintain his said action thereof against him, &c. And for causes of demurrer in law in this behalf, the said *R. M.*, according to the form of the statute in such case made and provided, shews to the court here these following causes, that is to say; for that it is not alledged, nor does it appear in or by the said second count of the said declaration, that the said *J. D.*, deceased, in his lifetime, had such an interest or estate of and in the premises, in the said second count of the said declaration mentioned to have been demised by

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him to the said Sir *J. S.*, the father, at the time of making the said indenture of demise in that behalf, as would or could by law, upon the death of the said *J. D.*, vest in the said *J. M.* as his executor, so as to enable him the said *J. M.*, as such executor, to maintain any action of covenant for the breaches in that count mentioned. And also for that it is not alledged, nor does it appear in or by the said second count in the said declaration, that the said *J. D.* deceased, in his lifetime, had such an interest or estate of and in the said premises in the said second count of the said declaration specified to have been demised to the said Sir *J. S.*, the father, at the time of making the said demise therein mentioned, as would or could enable him by law to make such demise as in the said second count of the said declaration mentioned; and also for that it appears, in and by the said declaration in the said second count thereof, that the said indenture of demise in that count mentioned to have been made between the said *J. D.*, of the one part, and the said Sir *J. S.*, the father, of the other part, was void in law, inasmuch as the said *J. D.* thereby demised the said premises therein mentioned for a longer term than he the said *J. D.* was possessed of or entitled unto in the same; and also for that it is not alledged, nor does it appear in or by the said second count of the said declaration, that the said *J. D.* deceased, at the time of his death, had any estate, right, title, or interest whatsoever, of, in, or to the said demised premises, in the said second count of the said declaration mentioned; and also for that the said second count of the said declaration is argumentative, in this, that the said *J. M.* hath in and by his said second count of his said declaration shewn, that he duly proved the will of the said *J. D.*, and took upon himself the burthen and execution thereof, and thereby became and was, and still is possessed, of all the interest of the said *J. D.*,

of and in the said premises, with the appurtenances, without positively alledging or shewing that the said *J. D.* was at the time of his death possessed of such an estate or interest in law in the premises, as upon his death could by law vest in the said *J. M.* as his executor, for the purpose of enabling him as executor as aforesaid, to maintain any action of covenant upon that breach; and also for that no material issue can be taken upon such argumentative pleading; and also for that the said breach of covenant in the second count first above assigned is double, in this, that it joins and attempts to put in issue two distinct matters, viz.—what rent was due from the said Sir *J. S.*, the son, and also what rent was due from the said *R. M.*, as administrator as aforesaid, in the same breach; and also for that the said breach of covenant in the second count secondly above assigned, is double, in this, that it joins and attempts to put in issue two distinct matters, viz.—whether the said Sir *J. S.*, the son, in his lifetime, repaired the said premises or not, and also whether the said *R. M.* surrendered the same properly repaired or not; and also for that the said breach is contradictory and absurd, in this, that it states that the said Sir *J. S.*, the son, suffered and permitted the said premises to be out of repair until the determination of the said term, whereas it appears by that breach that the said Sir *J. S.* was dead at the determination of the said term; and also for that the said declaration is in other respects insufficient, informal, and absurd.

Joinder in demurrer.

Baldwin, for defendant. There are many causes of demurrer to this declaration; but some I don't wish to argue. My first objection to this action is, that the plaintiff has not a sufficient legal title to maintain it. The plaintiff sues as executor of the lessor, and it does

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not appear from the declaration that he has more than an equitable interest. He claims his right of action as an executor, but the covenants which he states to have been broken after the testator's death are not mere personal covenants, but run with the land; and if so, plaintiff must shew that he has a legal interest in the land. The declaration does not shew of what estate *Harvey* was seised, but merely that he demised to *Durno*; it should have shewn that he had an estate in fee, and that *Durno* was a mere termor (*a*). The second objection to the action is, that *James Durno*, or his executors, had no right to the further term; it was only grantable on condition that it should be made at his expence, and that he should execute a counterpart of such fresh lease. He should therefore have prepared the lease and tendered it for execution, and prepared a counterpart; he never did so, and therefore had no right to grant a lease to *Sir J. Shelley*; besides which, as he had only a right to demand a renewal of the lease, yet not having got a renewal, he surely could not demise. As to the second count, on the parol demise from *Harvey* to *Durno*, I contend it is objectionable, on the ground that at the death of either of the parties, the term ceased after the end of the year. *Durno* died within the term on which his interest ceased (after the year had expired) and all the breaches are after that period.

Wood, for the plaintiff. Admitting the correctness of the objections to the first count, I urge that the second count is not objectionable. It appears that the defendant, or those he represents, have enjoyed the premises. The demise stated is to *Durno*, his executors, administrators, and assigns, for so long as

(*a*) *Com. Dig. Pleader. E. 19, c. 35. Co. Lit. 17, a. 1 Brod. and B. 531.*

Harvey or *Durno*, his executors, administrators, or assigns and administrators, please. A demise so worded does not determine on the death of *Durno*. The fact of this demise is confessed by demurrer. This is a title in the executor of *Durno*, and the defendants have held under it. It is not necessary that *Durno* should have a title as large (at the time of demise) as the estate demised. It is good for the term he has, and his interest has in fact continued. 2 Stra. 817. In the present case the lessee has held and enjoyed, and the interest of the lessor has continued. It would be doing a great injustice to say that the plaintiff could not bring this action.

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Baldwin, in reply. There would be no such injustice. The plaintiff might perhaps bring his action in another form, and declare upon a special agreement. With reference to the demise from *Harvey* to the lessor, his executors or administrators, I contend, that after *Durno's* death, on the commencement of every new year, there was a new taking by the executors.

LORD MANSFIELD, C. J. It don't determine by death of *Durno*, as the demise is here stated.

Judgment for plaintiff on second count.

Sir JAMES HARRINGTON, *Bart.* against CHARLES KLOPROGGE, *Esq.* M. T. 25 Geo. 3.

DECLARATION in debt on a common moneybond, dated 24th December, 1771, from defendant to plaintiff, in the penal sum of 1,200*l.* Plea, after 5 and 6 *Edw.* 6 (a). So an assignment of the profits of all offices, which the defendant might acquire, is legal, as it will be taken to mean of all offices that may be legally assigned. The office of private secretary does not fall within the meaning of the words the defendant might acquire.

(a) See 2 *Brod. & B.* 678. The buying or selling of public offices is rendered illegal by the stat. 5 & 6 *Edw.* VI. c. 16, s. 2 & 3, by which it is de-

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craving oyer of bond and condition, which was as follows, to wit, "Whereas, in and by a certain bond or obligation in writing, bearing date the 18th day of

clared that all bargains, sales, promises, bonds, agreements, covenants, and assurances for money, or other profit in consideration of, or relating to appointments touching the administration of justice, or the collection of the revenue, &c. or for the deputation thereof, shall be void. The provisions of this statute have been since extended to *Scotland* and *Ireland*, and to all offices in the gift of the crown, all commissions, civil, naval, and military, and all places and employments in the departments and offices there particularly mentioned. Stat. 49 *Geo.* 3, c. 126. 53 *Geo.* 3, c. 129. See 1 *Stark. Rep.* 92. See also as to what may be considered as the offices intended by the statute 5 & 6 *Edw.* 6. 3 *Lev.* 289. *Willes*, 571. S. P. *Godolphin v. Tudor*, *Salk.* 468. *Browning v. Halford*, *Freem.* 19. 1 *H. Bla.* 322. The 7th section of the latter act contains a proviso, that it shall not extend to any purchase or sale, or agreement for the purchase or sale, of certain offices in the palace, or commissions in the army, at the regulated prices, and by authorized regimental agents, acting without fee. And the statute does not prohibit a deputation to any office where it is lawful to appoint a deputy, or any agreement, &c. lawfully made in respect of any allowance, salary, or payment made, or agreed to be made, by or to such principal or deputy respectively, out of the fees or profits of such office. The 11th section also contains an exception as to annual payments out of the fees to any person formerly holding the office, provided such reservation, and the circumstances under which it was permitted, is stated in the instrument of appointment of the person succeeding to the office. In a recent case, an appointment to trustees of all the emoluments and profits to arise and become due to the assignor, as clerk of the peace, (after deducting the salary or allowance of his deputy for the time being,) upon trust, to pay certain debts of the grantor, and to pay over the residue, was holden void. *Palmer and another v. Bate and others*, 2 *Brod. and Bing.* 573. Here the office itself was not saleable, and an assignment of the profits attached to it, and intended for its support and dignity, is equally against public policy; nor is the reservation of the allowance for the deputy sufficient. The half-pay of an officer in the army cannot be assigned. *Arbuckle v. Cowtan*, 3 *B. and P.* 321. *Barwick v. Read*, 1 *H. B.* 627. *Flarty v. Odhun*, 3 *T. R.* 681. But this act does not extend to prohibit an agreement by a principal to pay his deputy a proportion; as for instance, half of the profits of the office; for here the profits still belong to the principal, and must be sued for in his name, although a share is to be allowed out of them to the deputy, for his trouble. *Per Cur.* in *Godolphin v. Tudor*, *Salk.* 468. *Gulliford v. De Cardonell*, *Salk.* 466. But the reservation must be to pay out of the profits; and where a bond was given, with condition to reserve a sum certain, without contingency, the bond was held void. *Parsons v. Thompson*, 1 *H. Bla.* 322. The statutes, 37 *Hen.* 8. c. 1. sec. 3. and 1 *W. and M.* c. 21. s. 5, allow and regulate the assignment of the profits of certain offices, as the office of clerk of the peace, &c.

December instant, the above bound defendant, together with the above bound plaintiff, did become jointly and severally bound unto *T. N.* of the city of *London*, Esq. in the penal sum of 1,200*l.*, with a condition thereunder written, that if the said defendant and plaintiff, or either of them, their or either of their heirs, executors, or administrators, did and should well and truly pay or cause to be paid unto the said *T. N.*, his executors, administrators, and assigns, one annuity or yearly sum of 100*l.* of lawful money of *Great Britain*, by quarterly payments, on the days and times, and in manner therein mentioned, for and during the natural life of the said defendant, then the said bond was to be void. And whereas for the better securing the payment of the said annuity, the above bounden defendant, together with the said plaintiff, did enter into and execute a warrant of attorney, bearing even date with the said bond, empowering certain attornies therein named to confess judgment against them in an action of debt on the said recited bond, at the suit of the said *T. N.* in his Majesty's Court of King's Bench, in manner therein mentioned, for the said sum of 1,200*l.* besides costs of suit, as in and by the said recited bond and warrant of attorney, reference being thereunto respectively had, may more fully appear. And whereas the said plaintiff entered into and executed the said recited bond and warrant of attorney, at the special instance and request, and upon the pressing intreaties of the said defendant; and the said defendant received the whole consideration money, which was given and paid for granting the said annuity of 100*l.* to the said *T. N.* his executors, administrators, and assigns as aforesaid, and the said plaintiff received no part thereof, except the sum of 150*l.* which the said *C. K.* deposited in the hands of the said plaintiff, for the purpose of paying the said annuity, so far as the same will extend. And whereas the said defendant,

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in order to indemnify the said plaintiff, his executors, administrators, and assigns, from the payment of the said annuity, hath agreed, when and so soon as the said defendant shall become possessed of and intitled unto any commission, post, place, salary, pension, or pay whatsoever, that then he the said defendant shall and will immediately execute a proper assignment thereof, and fully and effectually authorise and empower the said *J. H.*, his executors, administrators, and assigns, to receive and take the whole fees, profits, and emoluments thereof, and in the mean time, and until such event shall happen, that he the said defendant shall and will, from time to time, pay unto the said plaintiff, his executors, administrators, or assigns, all such sum and sums of money as he shall receive by means, or on account of his being private secretary to the right Hon. the Earl of *H.* Now the condition of this obligation is such, that if the above bounden defendant shall and do, immediately upon his becoming possessed of or entitled unto any commission, post, place, salary, pension, or pay whatsoever, execute a proper assignment thereof unto the said plaintiff, his executors, administrators, or assigns, and fully and effectually authorise and empower him and them to receive and take the whole fees, profits, and emoluments thereof, as the same shall become due and payable; and in the mean time, and until such event shall happen, if he the said defendant shall and do, from time to time, pay into the hands of the said plaintiff, his executors, administrators, or assigns, all such sum and sums of money whatsoever, as he the said defendant shall or may receive by means or on account of his being such secretary to the said Earl of *H.* as aforesaid; and also, if he the said defendant, his heirs, executors, or administrators, shall and do, in and by all things, save, defend, keep harmless and indemnified the said plaintiff, and his heirs, executors, and

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administrators, and every of them, and his, their, and every of their lands and tenements, goods and chattels, of, from, and against the payment of the said annuity of 100*l.* in the condition of the said recited bond mentioned as aforesaid, and all arrears thereof; and also of, from, and against all and all manner of actions, suits, loss, costs, charges, demands and expences whatsoever, which he the said plaintiff, his heirs, executors, or administrators, or any of them, shall or may bear, pay, lay out, suffer, sustain, or be put unto, for, or by reason, or on account of any nonpayment of the said annuity, or any part thereof, or for, or by reason, or on account of the said plaintiff, his having entered into and executed the said recited bond and warrant of attorney as aforesaid, or either of them, or any matter or thing in them, or either of them contained, or in any manner relating thereto, then this obligation to be void, or else to remain in full force and virtue: which being read and heard, the said defendant saith, that the said plaintiff *actio non*; because he saith that he the said defendant, for a certain space of time from and after the making of the said bond; to wit, from thence until and upon the 24th December, 1772, and no longer, continued private secretary to the Earl of *H.* and that he the said defendant hath not at any time since the making of the said bond, become possessed of or intitled unto any commission, post, place, salary, pension, or pay whatsoever; and that, he, the said defendant, during the whole time that he continued private secretary to the Earl of *H.*, did, from time to time pay into the hands of the said plaintiff, all such sum and sums of money whatsoever, as he the said defendant did or might receive by means or on account of his being such secretary to the said Earl of *H.* as aforesaid; and also, that he the said defendant hath continually, from the making of the said writing obligatory, hitherto in and by all things saved, defended, kept

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harmless, and indemnified the said plaintiff, and his lands and tenements; goods and chattels, of, from, and against the payment of the said annuity of 100*l.* in the condition of the said recited bond mentioned as aforesaid, and all arrears thereof, and also of, from, and against all and all manner of actions, suits, loss, costs, charges, damages, and expences whatsoever, which he the said plaintiff hath hitherto borne, paid, laid out, suffered, sustained, or been put unto, for or by reason, or on account of any non-payment of the said annuity, or any part thereof, or for or by reason or on account of the said plaintiff, his having entered into and executed the said recited bond and warrant of attorney as aforesaid, or either of them, or any matter or thing in them, or either of them contained, or in any manner relating thereto, according to the tenor of the said condition of the said bond or writing obligatory, to wit, at *Westminster* aforesaid, and this," &c.

Replication, *precludi non*; because, he says, that he the said defendant, whilst he so continued private secretary to the said Earl of *H.* as in the said plea mentioned, to wit, on the 23*d.* December, 1772, at, &c. aforesaid, received divers large sums of money, to wit, the sum of 500*l.* by means and on account of his being such secretary as aforesaid, yet the said defendant did not pay the said last mentioned sum of money, or any part thereof, into the hands of the said plaintiff, but altogether neglected and refused so to do, and still doth refuse, contrary to the form and effect of the said condition of the said writing obligatory in the said declaration mentioned; and this the said plaintiff prays may be inquired of by the country; and the said defendant doth the like, &c.; and the said plaintiff, according to the form of the statute in such case made and provided, further says, that he the said plaintiff, since the making of the said writing obligatory in the said

declaration mentioned, and before the exhibiting the bill of the said plaintiff (that is to say), on the, &c., at, &c. aforesaid, was obliged to pay, and did pay to the said *T. N.*, in the said plea mentioned, a large sum of money, to wit, the sum of 1000*l.* in discharge of arrears of the said annuity or yearly sum of 100*l.* in the said plea mentioned, then due and payable to the said *T. N.*, whereof the said defendant afterwards, to wit, on the same day and year last aforesaid, at *Westminster* aforesaid, had notice, yet the said defendant (although often requested) hath not, at any time hitherto, repaid to the said plaintiff the said last mentioned sum of money so paid by him in discharge of the said arrears of the said annuity as aforesaid, or any part thereof, nor hath he, in any manner whatsoever, saved, defended, kept harmless, and indemnified the said plaintiff from and against the payment of the same, but hath altogether neglected and refused so to do; and the said plaintiff still remains undefended, and not in anywise saved or kept harmless or indemnified therefrom, or from any part thereof, to wit, at, &c. aforesaid, contrary to the form and effect of the said condition of the said writing obligatory in the said declaration mentioned in that behalf, made as aforesaid, and this, &c.

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Demurrer, and joinder in demurrer.

Morgan, for the defendant. The condition is contrary to the statute and common law. The statute 5 and 6 *Edw. VI. c. 16*, against the sale of public offices, is general, and includes this case. The condition is also against common law, as it is to assign any office he might have.

SED PER CURIAM. The office in question is private secretary to Lord *Holderness*; that may be as-

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signed. The condition must be taken to mean, that he shall assign all offices which may legally be assigned.

Judgment for plaintiff.

T. T. 25 Geo. 3.

GREY against CUTHBERTSON and another.

The assignee of a lease is not liable to the original lessor for a breach of covenant not running with the land, unless he be expressly named in the lease as a covenantor (a).

DECLARATION in covenant, stating that one *William Mills* was possessed of a term of years, and that by indenture, dated 22d September, 1770, between *W. Mills* and plaintiff, *W. Mills* demised certain premises to plaintiff, *habendum* for fourteen years; and amongst other covenants in the lease, the declaration set forth the following one: that at the end or expiration, or other sooner determination of the said demise, a fair valuation and appraisement should be made by two indifferent persons (one to be chosen by each of the parties to the said indenture, or their respective executors, administrators, or assigns) of all and every the fruit trees and bushes that should be then standing and growing, and which should have been planted and set by the said plaintiff, his executors, administrators, or assigns, upon the said demised premises, and that he the said plaintiff, his executors, administrators, or assigns, should yield and deliver up the same trees and bushes to the said *William Mills*, his executors, administrators, or assigns, at the value or appraisement thereof to be made and fixed as aforesaid; and the said *William Mills*, for himself, his executors, and administrators, did by the said indenture, &c. (amongst

(a) See 3 *Wils.* 27. 4 *T. R.* 720, 726, upon a covenant running with the land, which must concern real property, or the estate therein. 3 *Wils.* 29. 2 *H. B.* 133. 10 *East*, 138. 2 *Marsh.* 1, 4., the assignee of the lease is liable to an action for a breach of covenant after the assignment of the estate to him. *Bac. Ab. tit. Covenant*, E. 34. 3 *Wils.* 25. 2 *Saund.* 304, n. 12; and though he have not taken possession. 7 *T. R.* 312. 2 *Saund.* 182. 1 *Salk.* 198. 1 *Lord Raym.* 322.

other things) covenant to and with the said plaintiff, his executors, administrators, and assigns, that he the said *William Mills*, his executors or administrators, should and would well and truly pay, or cause to be paid to the said plaintiff, his executors, administrators, or assigns, immediately after such valuation or appraisement should be made by two indifferent persons, as aforesaid, all such sum or sums of money for such trees and bushes as the same trees and bushes should be valued or appraised at. The declaration then alleged plaintiff's entry, and that all the said *William Mills's* interest in the premises, before the expiration of the term, became vested in the defendants; and then a breach of the said covenant by the defendants as assignees. Demurrer, and joinder in demurrer.

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GREY
against
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Clayton, for the defendant. The covenant on which this breach is assigned does not extend to an assignee, as he is not named therein. The lessee does not covenant for himself, his executors, administrators, *and assigns*, so it only binds him or his personal representatives. The covenant does not in its nature run with the land, as it concerns a thing not in *esse*. He cited *Spencer's case*, 5 *Coke*, and 3 *Wils. Rep.* 25.

Wood, contra. The covenant relates to a thing to be done on the land, and runs with it. The cases in *Moor*, 159. *Ow.* 151. *Lev.* 109. *Kitchen v. Buckley*, *Cro. El.* 493, are in the plaintiff's favour.

PER CURIAM. The plaintiff is not without remedy; he may bring an action against the original lessor, who always remains liable: but his right of action for a breach of this covenant cannot be extended to an assignee, without his being named in the covenant, as the subject matter of it does not relate to a thing in *esse* at the time of the demise. The Court recognized the authority of *Spencer's case*.

Judgment for defendant.

1785.

*E. T. 25 Geo. 3.**JONES against OSBORN.*

Seemle—
an hotel keeper
is subject to the
same liabilities
as an innkeep-
er, but he should
be declared
against as an
innkeeper (a).

DECLARATION that the said defendant, before and on, &c., was, and from thence hitherto hath been, and still is, the master and keeper of a certain common and public hotel, for the reception, lodging, and entertainment of guests; that is to say, a certain common and public hotel, commonly called or known by the name of *Osborn's Adelphi Hotel*, in the parish of, &c., in the county of, &c.: and whereas the said defendant, being such master and keeper of the said hotel, as aforesaid, the said plaintiff heretofore, to wit, on the day and year aforesaid, at, &c. aforesaid, entered, and was then and there received into the said hotel as the guest of him the said defendant therein; and during the time that he was such guest, to wit, on the day and year aforesaid, he the said defendant was lawfully possessed of a certain note of the Governor and Company of the Bank of *England*, commonly called a bank note, for the payment of the sum of twenty pounds, and of another large sum of money, to wit, the sum of seven pounds eighteen shillings of lawful money of *Great Britain*, as of his own proper note and money; and which said note and money were then and from thence, until the time of the loss

(a) See the late case of *Thompson v. Lacy*, 3 Barn. & Ald. 283, where it was held, that a house of public entertainment in *London*, where beds, provisions, &c. were furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage coaches and waggons from the country, and which had no stables belonging to it, was to be considered as an inn, and the owner of it subject to the liabilities of innkeepers. *Sed quare*. See *Doe v. Laming*, 4 Camp. 77, where it was held, that a coffee-house keeper was not an innkeeper, within the meaning of a policy of insurance against fire. See *Jeremy*, 139. *Latch*, 127. 1 Lord Raym. 479. 12 Mod. 254. *Carth.* 417. As to the liability of innkeepers, see *Jeremy's Law of Carriers*, 144. *Jones on Bailments*, 95. 8 Rep. 63.

thereof hereinafter mentioned, within the said hotel, to wit, at, &c. aforesaid; yet the said defendant, so being the master and keeper of the said hotel as aforesaid, not regarding his duty as such master and keeper thereof, did not keep the said note and money of the said plaintiff, so being within the said hotel as aforesaid, safely and without diminution or loss, so that no damage might arise or happen to the said plaintiff in any manner of way by the negligence or default of him the said defendant and his servants, but on the contrary thereof, he the said defendant and his servants so negligently and carelessly conducted themselves in this behalf, that afterwards and whilst the said plaintiff was a guest in the said hotel as aforesaid, to wit, on the day and year aforesaid, the said note and money were by and through the mere negligence and default of the said defendant and his servants, and without the consent or knowledge of him the said plaintiff, wrongfully and injuriously taken and carried from and out of the said hotel, or otherwise embezzled and secreted, by some person or persons to the said plaintiff unknown, and were thereby wholly lost to the said plaintiff.

Demurrer, assigning the following causes, viz. that the said hotel or house in the said declaration mentioned, is not in or by the said declaration averred or shewn to be a common or public inn, or that the same and the said defendant, as such master or keeper thereof as aforesaid, are within the custom of this realm as to inn-keepers; and for that it does not appear in or by the said declaration, that the said note and money therein mentioned were ever delivered to the said defendant or his servants, or that he ever received the same or had the care thereof, or that he undertook or was obliged or bound to safely keep the same, or to take care thereof; and for that it does not appear in

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or by the said declaration, that the said defendant was to have or receive any reward for the safe keeping or care of the said note and money ; and for that no negligence or default is charged or alledged in the said declaration, either in the said defendant or his servants, otherwise than as against or in disregard of a supposed duty in him the said defendant, as such master or keeper of the said hotel in the said declaration mentioned as aforesaid ; and also that the said declaration is in various other respects uncertain, insufficient, and informal, &c.

Joinder in demurrer.

Shepherd, for defendant. The objection to this declaration is, that the defendant is not stated to be a bailee in any character which can make him liable. An hotel-keeper cannot be considered a common inn-keeper ; and if so, the plaintiff ought to have described him as such. If a man acts as an inn-keeper, he is liable. But an hotel is not an inn. An inn is instituted for passengers, travellers, and wayfaring men. It cannot be said that an hotel is for this purpose an inn (*b*). If a man make a contract with an inn-keeper for a separate lodging, and has the exclusive possession thereof, as to him it is not an inn (*c*). Here the plaintiff may be considered as a mere lodger, and the defendant as a lodging-house keeper, who makes a contract with every man that comes ; whereas an inn-keeper is bound by the law of the realm, and not by contract, to receive guests (*d*).

PER CURIAM. The Court thought the defendant had better withdraw his demurrer, and that these objections would come more proper upon the trial, as the law must depend upon the facts of the case.

(*b*) *Cayle's case*, 8 *Coke*, 683.

(*c*) *See Holt*, C. N. P. 209. 1 *Stark*. 249.

(*d*) *See Parkhurst v. Foster*, 1 *Salk*. 387 ; and 3 *B. and A.* 287.

REX against COTTRELL.

1785.

Trinity Term.

THE defendant in this case was convicted under the 5 *Anne*, c. 14, before a justice of the peace, for using two lurchers for the destruction of game. The offence, as appeared by the conviction, was committed in the parish of *Tadley*, in the county of *Southampton*, and the defendant was convicted on the oath of *Henry Tull*, of the same parish. A motion was made to quash the conviction, on the ground that the witness was described of the same parish where the offence was committed, and therefore that he was not a good witness.

A party may be convicted on a statute, giving part of penalty for the offence to the parish, wherein it is committed, on the oath of a witness residing within the parish, provided such witness does not pay rates.

PER CURIAM. The witness being of the parish is no objection, unless he pays rates; for then the money the parish is entitled to, may go in alleviation of the rates, and the witness would be interested.

Conviction affirmed (a).

(a) In the *King v. Prior*, in the same Term, the like objection was made to another conviction, and the conviction was affirmed.

KER against MITCHELL.

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Mich. Term.

DEBT on bond, dated 23d *December*, 1779, given by defendant, in the penal sum of 4,450*l.* unto the defendant, from all actions, legal proceedings, and costs, &c. which may be the consequence of A.'s delivering over to defendant a bill of exchange, part of the proceeds whereof a third person is entitled to, is forfeited, by a payment over by A. to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action; and though A. give no notice of the payment to the defendant (a).

A bond, conditioned to save harmless A.

(a) As to what is a legal damnification, to entitle a surety to sue, see 8 *East*, 593. 3 *Wils.* 13. 1 *Atk.* 262. In analogy to the above decision it may be observed, that in actions on covenants for good title and quiet enjoyment, it is not necessary to entitle the purchaser to sue for a breach of the covenant to shew that he has been evicted by legal process, though

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plaintiff and one *Andrew Moffatt*, since deceased. Plea, prayingoyer of bond and condition, whereby, after reciting (b) that by articles of agreement under

it is advisable to do so ;, it is sufficient to state that the party availing had lawful right and title to do so, &c. without shewing the nature of such title, see 4 *Term Reports*, 617. 8 *Term Reports*, 278. See also *Cro. Jac.* 315. 2 *Saund.* 177. 1 *Lev.* 301. 1 *Sid.* 466. 2 *Bos. & Pul.* 14. n. 6.

(b) The recitals were as follow : whereas, in and by certain articles of agreement indented and dated the 12th of *December*, 1776, and made or mentioned to be made between the above-named *R. K.* and *R. S.* purser of the said ship, *Princess Royal*, of the one part, and the said *A. M.* and *G. D.* of the other part ; after taking notice that all the said parties to the said articles had purchased and shipped on board the said ship, then bound on a voyage to *India* and *China*, a quantity of coral and pearls, of the value together of 6,902*l.* 1*1s.* 5*d.*, and had agreed that the same should be carried to *China* and there sold by the said *R. K.* and *R. S.*, for the account and risk of the said parties, in the proportions therein mentioned. It was witnessed, that the said *R. K.* and *R. S.* thereby covenanted to carry the said coral and pearls to *China*, freight free, and to sell and dispose thereof there, free from any other merchandise, and render an account of the sales thereof unto the attornies of the said *A. M.* and *G. D.*, in *London*, and also to pay the proportions of the money arising thereby, belonging to the said *A. M.* and *G. D.* into the English Company's Cash, at *Canton*, and take fresh bills of exchange for the account thereof to the said attornies, without demanding any money for commission or disbursements, other than what were necessary in completing such sales, and making such remittances, of which the said *A. M.* and *G. D.* thereby covenanted to pay and allow their respective proportions to the said *R. K.* and *R. S.*, and also to stand to and support all sea risks and other casualties concerning their said respective proportions of and in the said goods, as by the said in part recited articles of agreement, relation being thereunto had, may more fully appear : and whereas the said *R. K.* did accordingly carry out the said goods to *Canton*, and sold part thereof to one *S.* for 7436½ Spanish old dollars, for payment whereof the said *S.* gave his bond or obligation, called a chop, to the said *R. K.*, and other part thereof the said *R. K.* sold to one *K.* for 2,900 old Spanish dollars, for payment whereof the said *K.* gave his chop or obligation to the said *R. K.*, both which chops or obligations the said *R. K.*, on his departure from *China* to *England*, left in the hands of *J. B.*, esq. at *Canton*, together with divers other bonds which had been given for the payment of the monies for which other parts of the said goods had been sold in *China* by the said *R. K.*, in order that the same might be received by him the said *J. B.*, and together with one box of coral, of the value as per invoice, of 1476*l.* 8*s.*, for which said bonds or obligations and box of coral the said *J. B.* gave an acknowledgment, dated *Canton*, 28th of *January*, 1778, whereby he acknowledged that he had the same in his possession, and that they were the property, and at the risk of the said *R. K.* ; and

seal, made between plaintiff and *R. Scott*, purser of a certain ship, of the one part, and the said defendant

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whereas the said *R. K.* on the 25th of *April*, 1778, being at the *Cape of Good Hope*, signed an order of that date directed to the said *J. B.*, whereby he required him, if he had not received the amount of *S.*'s chop before the receipt of that order, to deliver the said chop to the said *G. D.*, and place it to the account of the said *R. K.*; and by another order of the same date the said *R. K.* required the said *J. B.* upon receiving *K.*'s chop to him of 2,900 old Spanish dollars, to pay to the said *J. D.*, or order, 1,135 and two fifths old Spanish dollars, together with 1 per cent per month for six months on the above sum, and to place the same to the account of the said *R. K.*; and whereas, by a certain declaration in writing, under the hand of the said *R. K.*, bearing date the 6th day of *January*, 1779, the said *R. K.* declared that 7,438 and three fourths Spanish pillar dollars of the sum due by the said *S.*, and 1,135 and two-fifths Spanish head dollars of the sum due by *K.*, part of the sums mentioned in the receipt given by the said *J. B.*, were the property of the said *A. M.* and *G. D.*, and to be paid to them when the same were remitted and paid to him or his attorney, together with any interest or exchange that might arise thereon, provided the above sum had not been already paid to the said *G. D.*, by virtue of the before-mentioned order, and that the said *G. D.* accounted with the said *R. K.* or his attorney for his share of the said box of coral (ordered to be delivered to him as aforesaid, and to be disposed of) according to the said recited articles of agreement; and whereas it now appears that the said *J. B.*, on the 10th of *January*, 1779, paid into the cash of the treasury of the English East India Company, at *Canton*, 8,482 new milled *Mexico* dollars, at the exchange of 5s. 3d. sterling per dollar, for account of the said *R. K.*, for which the president and council belonging to the factory of the said company, gave to the said *J. B.* their bill of exchange on the directors of the united company of merchants of *England* trading to the *East Indies*, dated *Canton*, the 10th day of *January*, 1779, for the sum of 2,226l. 10s. 6d. sterling, for 8,482 new milled *Mexico* dollars, at the exchange of 5s. 3d. sterling per dollar, received of the said *J. B.*, payable to the order of the said *R. K.*, at twelve months sight, without interest, for which credit was given in the Company's cash accordingly, which bill of exchange hath been remitted to the said *A. M.*, and on the 8th of *September* now last past, was duly accepted by order of the said Company; and whereas it being apprehended and believed that the said 8,482 dollars so paid into the Company's treasury at *Canton* by the said *J. B.*, and for which the said accepted bill of exchange was given as aforesaid, was the neat amount of the 7,438 and three-fourths Spanish pillar dollars received by the said *J. B.* of *S.*, and declared by the said *R. K.*, on the 6th of *January*, 1779, to be the property of the said *A. M.* and *G. D.*, and the interest and exchange due thereon, he the said *A. M.* as attorney for the said *R. K.*, and at the request of the said *A. M.* and *G. D.*, or their order, delivered the same to them, the receipt whereof they do hereby jointly acknowledge; Now the condition of the above-written obligation is such, that if, &c.

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and *George Davidson*, of the other part, after reciting that the said parties were concerned in a joint trading adventure for the sale of china, coral, and pearls, to be carried to *China*, and there sold by the plaintiff and *R. Scott* for the account of all parties, and that plaintiff and *R. Scott* thereby covenanted to pay the proportions of the defendant and *George Davidson's* monies arising from the said sales unto the *English Company's* cash at *Canton*; and that after the making such articles of agreement, the said plaintiff and *R. Scott* did carry the goods to and sell the same, part thereof in *China*, part thereof to one *Skykinquas*, for 7,438 and a half Spanish old dollars, for payment whereof the said *Skykinquas* gave his bond to the said plaintiff, and other part of the said goods to one *Kewshaw*, for 2,900 old Spanish dollars, for payment whereof the said *Kewshaw* gave his bond, which bonds the said plaintiff, on his departure from *China* to *England*, left in the hands of *James Bradshaw*, at *Canton*, together with divers other bonds which had been given in payment of monies on which other parts of the said goods had been sold in *China* by the said plaintiff, in order that the same might be received by the said *James Bradshaw*, and together with one box of coral of value of 1,476*l.* 8*s.* for which bonds and box of coral the said *James Bradshaw* gave his acknowledgment that they were in his possession as the property and at the risk of the said plaintiff; that the said plaintiff, on the 25th of *April*, 1778, signed an order directed to the said *James Bradshaw*, requiring him if he had not received the amount of the said *Skykinquas's* bond before receipt of that order, to deliver the bond to the said *George Davidson*, and place it to the account of plaintiff; and that by another order the said plaintiff required the said *James Bradshaw*, upon receiving *Kewshaw's* bond, to pay the said *George Davidson*, or order, 1,135 and two-fifths old

Spanish dollars, &c., and to place the same to plaintiff's account; and that by declaration in writing of the said plaintiff, the said plaintiff declared that 7,438 and three-fourths Spanish pillar dollars of the sum due by *Skykinquas*, and 1,135 and two-fifths Spanish head dollars of the sum due by *Kewshaw*, were the property of the defendant and *George Davidson*, and to be paid to them, when the same were remitted and paid to him or his attorney, provided the same had not been already paid to the said *George Davidson* by virtue of the before-mentioned order, and that the said *George Davidson* accounted with plaintiffs for his share of the said box of coral, and that it then appeared that the said *James Bradshaw*, on the 10th of *January*, 1779, paid into the cash of the treasury of the East India Company, at *Canton*, 8,482 dollars, per account of the plaintiff, for which the president and council belonging to the factory of the said company gave to the said *James Bradshaw* their bill of exchange on the directors of the East India Company, in *England*, payable to plaintiff's order, at twelve months' sight, which said bill had been remitted to the said *Andrew Moffat*, and was accepted by the East India Company; and that it being believed that the money paid into the East India Company's treasury, was the net amount of the 7,438 and three-fourths Spanish pillar dollars received by the said *James Bradshaw of Skykinquas*, and declared by the plaintiff to be the property of defendant and *George Davidson*, the said *Andrew Moffatt*, as plaintiff's attorney, delivered the same to defendant and *George Davidson*. It was conditioned, that if the above-bound defendant and *G. D.*, or either of them, their or either of their heirs, executors, administrators, or assigns, should and did well and truly pay, or cause to be paid, unto the above-named *A. M.* and plaintiff, or one of them, their or one of their executors, administrators, or assigns, on demand, all such sum and sums of

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money, or value in money of all such good bills of exchange or securities for money, goods, or effects, as the said *G. D.* his representatives or assigns, or his or their attornies or agents, should or might have received or receive, by virtue of the said respective orders of the 25th of *April*, 1778, granted by the said plaintiff at the *Cape of Good Hope*, upon the *J. B.*, in favour of the said *G. D.*; and also in case the said *G. D.*, his executors, administrators, or assigns, did and should well and faithfully account with the said plaintiff, his executors, administrators, or assigns, or his or their attornies or agents, for the full share and proportion of the said plaintiff, of and in all net monies which might have arisen, or which should arise, by the sale of the before mentioned box of coral, left by the said plaintiff in the hands of the said *J. B.*, and directed to be delivered by the said *J. B.* to the said *G. D.*, to be disposed of, and coming to the hands, possession, or power of the said *G. D.*, his executors, administrators, representatives, attornies, or agents, according to the true intent and meaning of the said hereinbefore recited articles of agreement; and also if the above bounden defendant and *G. D.* or one of them, their or one of their heirs, executors, administrators, or assigns, should and did, from time to time, and at all times thereafter, well and sufficiently save, defend, keep harmless and indemnified, the said *A. M.* his executors, administrators, and estate, of, from, and against all manner of actions, suits, judgments, verdicts, damages, executions, decrees and orders, costs and expences, which should or might, at any time or times hereafter, be brought or prosecuted, given, obtained or made, levied, suffered, executed, expended, or paid by or against the said *A. M.* his executors, administrators, or estate, by reason of his indorsing and delivering the said recited bill of exchange to them the said defendant and *G. D.* as aforesaid, or of any mat-

ter or thing relative thereto or to the premises, then and in such cases the above-written obligation was to be void, otherwise to remain in full force and virtue : which being read and heard, the said defendant pleaded *actio non*, because that neither the said *G. D.* or his representatives or assigns, or his or their attornies or agents, ever have received any sum or sums of money, or value in money, of the said bills of exchange, or securities for money, goods, or effects, by virtue of the said orders mentioned in the said condition to be granted by the said plaintiff upon the said *J. B.*; and that the said *G. D.* never did receive the said box of coral in the said condition mentioned, or any money whatsoever arising from the sale thereof; and further, that the said *A. M.* his executors, administrators, or estate, have not, nor hath any of them, been damnified by reason of the premises in the said condition mentioned; and this, &c. concluding with a verification.

Replication, *precludi non*, because that the bill of exchange, in the condition of the said writing obligatory mentioned, was remitted by the said *J. B.* to the said *A. M.* for the purpose of paying to the said defendant and *G. D.* the amount of 7,438 and three quarters Spanish pillar dollars of the sum due from the said *S.* as in the said condition is mentioned, and that the residue and remainder of the said sum of money in the said bill contained, might be received by the said *A. M.* when the said bill should be paid for and on account of the said plaintiff; and that 1,952*l.* 13*s.* 6*d.* only, parcel of the said sum of 2,276*l.* 10*s.* 6*d.* in the said bill of exchange mentioned, at the time of the transmission of the said bill of exchange by the said *J. B.* to the said *A. M.*, were the amount of the said 7,438 and three quarters Spanish pillar dollars, in the said condition mentioned to be the property of the said de-

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defendant and *G. D.*; and that the sum of 279*l.* 17*s.*, the residue of the said sum of 2276*l.* 10*s.* 6*d.* in the said bill contained, was the property of the said plaintiff, and ought, when the said bill was paid, to have been received by the said *A. M.*, for and on account of the said plaintiff: and further, that the said *A. M.*, in his lifetime, made his last will and testament in writing, and thereby appointed *W.* Earl of *M.*, one *J. M.*, and one *J. H.* who is since deceased, executors thereof, and afterwards died without revoking the same; and that after the death of the said *A. M.*, to wit, on the 8th *April*, 1786, he the said plaintiff demanded of the said *J. M.* as one of the executors of the said *A. M.* the said sum of 273*l.* 17*s.* so as aforesaid due to him the said plaintiff, for and on account of so much of the money in the said bill of exchange contained, as by the said *A. M.* ought as aforesaid to have been received for and on account of the said *R. K.*, together with the sum of 76*l.* 8*s.* 10*d.* for and on account of interest due on the said sum of 273*l.* 17*s.* from the 8th *September*, 1780, on which day the said bill of exchange became due, and was paid; and which said sum of money, amounting in the whole to the sum of 350*l.* 5*s.* 10*d.* he the said *J. M.* as such executor as aforesaid, there paid to the said plaintiff, whereof the said defendant afterwards, to wit, on the said 8th *April*, 1786, had notice, that is to say, at, &c. aforesaid, which said sum of 350*l.* 5*s.* 10*d.* the said defendant and *G. D.* have not, nor hath either of them at any time since, repaid to the said *W.* Earl of *M.* and *J. M.* as surviving executors as aforesaid, or to either of them; and so the said plaintiff says, that the said *W.* Earl of *M.* and *J. M.*, surviving executors of the last will and testament of the said *A. M.* are damnified; and this he is ready to verify: wherefore, &c.

Rejoinder, protesting that the said bill of exchange in the said condition mentioned, was not remitted by the said *J. B.* to the said *A. M.* for such purpose as in the said replication is mentioned, but on the contrary thereof was remitted to the said *A. M.* for the purpose in the said plea mentioned; protesting also that the said replication, in manner the same, is above pleaded, and the matters therein contained are not sufficient in law for the said plaintiff to have or maintain his aforesaid action against the said defendant for a rejoinder in this behalf; the said defendant saith that the said *J. M.* in the said replication mentioned, was not compelled to pay the said sum of 273*l.* 17*s.* in the said replication mentioned, to the said plaintiff, by any action, suit, judgment, verdict, execution, decree, or order, had by the said plaintiff against the said *J. M.*, nor was the said *A. M.* in his lifetime, or the said *W. Earl of M.*, *J. M.*, and *J. H.* as executors of the said *A. M.* or any of them, since the death of the said *A. M.* compelled to pay any damages, costs, or expences, by reason of any action, suit, judgment, verdict, execution, decree, or order, of and concerning the premises in the said condition mentioned, but the same was paid by the said *J. M.* without any action, suit, judgment, verdict, execution, decree, or order being had or made against him: and further, that he the said defendant had not any notice of the intention of the said *J. M.* to pay the said sum of money to the said plaintiff, or of any demand being made by the said plaintiff of the said *J.* or of the said *A. M.* in his lifetime, or of the said Earl and *J. H.* after his death, or any of them; and so the said defendant saith that the said *A. M.* his executors, administrators, or estate, have not, nor hath any of them been damnified by reason of the premises in the said condition mentioned: and this, &c.

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To this rejoinder the plaintiff demurred generally, and defendant joined in demurrer.

Lawrence, for plaintiff. In this case, as appears from the recitals in the bond, the plaintiff, defendant, and *Davidson*, were concerned in a joint adventure to the *East Indies*. A large quantity of pearls and coral were loaded by the plaintiff, to the amount of 6000*l*. and he was to pay the amount of the produce, on the account of defendant and *Davidson*, into the treasury of the East India Company. A great part of these articles were sold, and the vendees gave their bonds to secure the payment of the price. The plaintiff left these bonds, and a box of coral, in the hands of *Bradshaw*, and *Bradshaw* acknowledged that he held them as the property, and at the risk, of the plaintiff. The plaintiff afterwards directed *Bradshaw* to pay a sum of money unto *Davidson*, and acknowledged that part of the monies in the hands of *Bradshaw*, was the property of the defendant and *Davidson*, and to be paid to them when the same were remitted to the plaintiff or his attorney. It appears that *Bradshaw*, after the plaintiff had made the above acknowledgment, paid some of the money arising from the bonds, unto the treasurer of the East India Company at *Canton*, for which the company gave their bill of exchange upon the East India Company in *London*, which bill was remitted to *Moffatt*, as the attorney of the plaintiff, and which bill was afterwards accepted by the drawees. The defendant and *Davidson*, thinking the amount of the money in the bill to be the amount of the money acknowledged by the plaintiff to be their property, requested *Moffatt* to deliver the bill over to them. *Moffatt* complied with this request, upon the defendant and *Davidson* giving their bond of indemnity. After the giving this bond, it turned out that the defendants were not entitled to the whole

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amount of the money for which the bill was given, but that the plaintiff was entitled to a share of it, namely, 27*3*l. Upon this the plaintiff demanded his share of *Moffatt*, who paid it. It is true, the money was paid to the plaintiff without his bringing an action, or instituting any other legal proceeding for the recovery of it, but that *Moffatt* paid it, thinking he was bound to do so. And so, indeed, he was bound, as the money clearly belonged to the plaintiff. It is also admitted, the defendant had no notice given him of the plaintiff's claim, before *Moffatt* paid it. I contend that no legal proceeding or notice was necessary; *Moffatt* being bound to pay, was quite enough. It was unnecessary to incur the expence or delay of any legal proceeding. It was a legal payment; and the defendant, not having repaid it to *Moffatt*, he has been clearly damnified, within the meaning of the condition of the bond. *Broughton's* case, in 5 *Coke's* Rep. 24, is an authority in point (a). By the terms of the condition, no notice was necessary; the party indemnified being obliged to pay, was enough; he was not bound to consult with the defendant, when in the mean time the plaintiff would bring his action, and put him to expence.

Baldwin, for the defendant. Admitting, perhaps, that no notice of the payment was necessary, yet, by the words of the condition of the bond, I maintain that *Moffatt* was not bound to pay the money, till he was actually compelled to do so by some legal proceeding. I think he was to consider himself as representing the defendant, and should not have paid the money over without his authority, or the compulsion

(c) See also the cases in 1 *Vent.* 36, 261. 1 *Jones*, 329, 330. 2 *Bulst.* 94. *Cro. Eliz.* 53, 264, 369. 1 *Rol.* 432. *Owen*, 19. *Cro. Car.* 349, 350. *Cro. Jac.* 288, 240, 127. *Dyer*, 187, pl. 4. *Yelv.* 207. 3 *Bulst.* 231.

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of legal process. Without this he could only have colluded with the plaintiff.

SED PER CURIAM. The doctrine contended for by the plaintiff, is correct; no suit was necessary if the plaintiff was legally entitled to the money.

Judgment for plaintiff.

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Mich. Term.

DOE *ex dem.* Dean and Chapter of WESTMINSTER,
&c. and others, against FREEMAN *et Ux.*

Under a devise of a copyhold estate to testator's wife, during her life, provided she continued single; but in case she did not, then unto A. B. when he should attain the age of 23 years; it was held, that though the widow married before A. B. attained that age, she was entitled to the estate until that event; and that the heirs at law were not entitled to it.

THE following was a case for the opinion of the Court, *viz.*—This was an ejectment to recover the possession of two messuages at *Harpenden*. The plaintiff claimed on several demises, *viz.* First, on the demise of the Dean and Chapter of *Westminster*, Lord of the manor of *Harpenden*; second, on the demise of *George Bruton* and *John Surry*; third, on the demise of *John Surry*. The cause came on to be tried at the Sitting after *Trinity Term*, 1786, at *Westminster Hall*, before the Hon. *F. Buller*, one of the justices of this honourable Court, when the jury found a verdict for the plaintiff, damages 1s., and costs 40s. subject to the opinion of the Court on the following case: that *W. W.* being seised, according to the custom of the manor of *Harpenden*, by his will, dated *October 25th 1781*, devised as follows:—"I give, will, and devise unto my loving wife *S. Warraker*, all that my copyhold messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, situate in *Harpenden*, at the time of my decease, for and during the term of her natural life, provided she remains a widow and not marry a second husband; but if in case she marries a second husband, then I give, will, and devise the said copyhold messuage or tenement, and all and every the appurtenances as above mentioned, unto my ne-

nephew, J. S., son of my late sister E. S. late deceased, when he shall attain his full age of twenty-three years; to have and to hold unto him and his assigns for ever; but upon condition that he my said nephew, J. S. shall pay unto my two nephews G. B. and R. B., sons of my late sister, S. B., and also unto my nephews and nieces, E. W., S. W., and J. W., children of my brother in law, J. W., and also unto A. G., W. G., and T. G., children of my sister, A. G., five pounds apiece, within two years after he is in the possession of the said copyhold messuage or tenement, and premises thereunto belonging, provided they are at their several ages of twenty-one years; but further, my will and meaning is such, that in case my said nephew, J. S. shall depart this life before he is in possession of the said copyhold messuage or tenement, and premises, then I give, will, and devise the said copyhold messuage or tenement, and premises as above-mentioned, unto my nephew, J. W., son of my brother in law, J. W., to have and to hold unto him and his heirs and assigns for ever, on condition of his paying the said legacies: that the copyhold estate was surrendered to the use of the will, and the testator died soon after the making of the will: that S. W., the widow, in 1784, married to the defendant: that J. S., one of the lessors of the plaintiff, is the devisee named in the will of the testator, and has not attained the age of twenty-three years: that the lessors of the plaintiff, G. B. and J. S. are heirs at law of the testator, W. W., and that the Dean and Chapter of Westminster are the lords of the manor of Harpenden, of which the premises are holden. The question for the opinion of the court is, whether the lessors of the plaintiff, or any of them, are entitled to recover in this action; if the Court shall be of opinion that the lessors of the plaintiff, or any of them, are entitled to recover, then the verdict to

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and others
against
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DEAN OF
WESTMIN-
STER, &c.
and others,
against
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stand; but if the Court shall be of opinion that the lessors of the plaintiff are not entitled to recover in this action, then a verdict to be entered for the defendant.

Lane, for plaintiff. The estate of the widow, *Sarah Warraker*, was determined on her marriage with the second husband. It then descended to the heir at law. It is a contingent remainder as to *John Surry*, who was not to take the estate unless he arrived at the age of twenty-three. This remainder, by the marriage of the widow, would have fallen to the ground had the estate been freehold and not copyhold, where the lord has a sufficient estate to support a contingent remainder.

In *Brown v. Cutler (a)*, where the testator devised his estate to his wife during her life, if she did not marry; but if she did marry, then that his son should take the estate; it was held that the wife took an estate only *durante viduitate*.

SED PER CURIAM. We must look to the intention of the testator, who devised the estate to his widow for her life, provided she did not marry; and that in case of her marriage it was to go to his nephew *when* he attained the age of twenty-three. It appears to us, that during the time the nephew was within ~~that~~ age, the estate remained in the widow.

Judgment for defendant.

(a) Sir *T. Raymond*, 427.

RAIMES *against* ROBINSON.

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Mich. Term.

DECLARATION in replevin for seizing a cow; first, cognizance as bailiff of the lord of the manor of *Wheldrake*, for damage feasant; second, avowry that at a court leet within the said manor, the defendant was elected a pinder, or common pound keeper, and as such justifying seizing the cow, damage feasant within the manor (a). First plea in bar to cognizance, roads, in that manner which the commissioners shall award, does not authorise them to sell the herbage by auction or otherwise to one individual commoner.

An inclosure act, authorising commissioners to make roads through inclosed lands, and declaring that the commoners of inclosed lands shall be entitled to the herbage of the

(a) This avowry was as follows: "defendant well avows, &c., because the said place in which, &c., long before and also at the time when, &c., was and still is a certain piece of waste ground lying and being within and parcel of the manor of *Wheldrake*, in the said county of *York*, of which said manor the said *B. T.* long before, and also at the said time when, &c., was and still is seised in his demesne as of fee. And the said *J.* further says that the said *B. T.*, and all those whose estate he now hath, and at the said time when, &c., had of and in the said manor with the appurtenances, from time whereof the memory of man is not to the contrary, have had and have used, and have been accustomed to have a certain court leet or view of frankpledge of all the inhabitants and residents within the said manor, to be held within the same manor, before the steward of the court of the same manor, for the time being, within one month after the feast of *St. Michael* the archangel, yearly; and the said *J.* further says, that within the said manor there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom there used and approved of, that is to say, that the homage of the same court leet or view of frankpledge, being sworn and charged at the same court leet or view of frankpledge, from time whereof the memory of man is not to the contrary, have been used and accustomed at the said court leet or view of frankpledge, to elect and appoint a sufficient and proper person, being an inhabitant within the said manor, to be pinder or keeper of the common pound and for the said manor, for one whole year then next following, or until some other person hath been elected and appointed in his stead, and the same person then so elected and appointed, hath then and there in open court been sworn into the said office, which said pinder or keeper of the said common pound so elected, appointed, and sworn, hath during all the time aforesaid, been accustomed in every year, at his and their will and pleasure, to view the common and waste ground of and belonging to the said manor, and when he hath found any cattle of any person or persons not having right of common of pasture for the same, in any of such wastes trespassing there, that then such pinder or keeper of the said common

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de injuria, with a traverse that the defendant was bailiff. Second plea in bar to cognizance, *de injuria*, with a traverse that the *locus in quo* is within the manor. Third plea in bar to cognizance, *de injuria*, with a traverse that *Beilby Thompson* was seised of *locus in quo*. Fourth plea in bar to avowry, *de injuria*, with a traverse that the *locus in quo* was waste land of the manor of *Wheldrake*. Fifth plea in bar to avowry, *de injuria*, with a traverse that *Beilby Thompson* was seised in fee of *locus in quo*. Sixth plea in bar to avowry, *de injuria*, with a traverse that defendant was elected pinder. Seventh plea, that before the said time when, &c., by an act of parliament reciting that within the manor of *Wheldrake*, in the county of *York*, there were several pieces of titheable waste land, and that *Beilby Thompson*, esq. was lord of the

pound hath, for all the time aforesaid, been accustomed to take and impound all such cattle so found trespassing there, and to detain them in pound until the owner or owners of such cattle hath or have made satisfaction for such trespasses, or until such cattle have been replevied by due course of law. And the said *J.* further says that the said *B. T.* being seised of the said manor with the appurtenances, in form aforesaid, at the court leet, or view of frankpledge, of him the said *B. T.* of his said manor, held in and for the said manor, within one month after the Feast of *St. Michael* the Archangel, in the year of our Lord, 1782, to wit, on the 21st day of *October*, in the same year, before *G. N.*, gentleman, then steward of the said court, the said *J.* was by the homage of the same court then and there elected and appointed to be pinder or keeper of the common pound of and for the manor aforesaid (he the said *J.* then being an inhabitant within the same manor, and a sufficient and proper person to execute the said office) for one whole year then next ensuing, until some other person should be elected and appointed in his stead; and the said *J.* was then and there in open court in due manner sworn in his said office, wherefore the said *J.*, immediately before the said time when, &c., being such pinder or keeper of the said common pound as aforesaid, by virtue of the custom aforesaid, went to the said place in which, &c. (being then a certain piece of waste ground lying and being within a parcel of the manor aforesaid) to view the same; and because the said cow of the said *R.*, at the said time when, &c., he the said *R.* not then having any right of common of pasture for any cattle in the said place in which, &c., was in the said close in which, &c., eating up the grass there then growing, and doing damage there; he the said *J.* as such pinder or keeper of the said common pound, as aforesaid, well avows the taking, &c.

manor, and, with other persons, were owners of several tenements therein, and entitled to right of common over the waste lands, and that it would be desirable to have these lands enclosed and cultivated, and exempted from tithes : It was enacted, that certain commissioners should inclose these lands, and make allotments unto the owners in lieu of their rights of common, and also unto the owner of tithes in lieu thereof, and that the commissioners should make public roads through these lands ; and it was also further enacted and declared, by and with the consent of the said *Beilby Thompson*, lord of the manor of *Wheldrake*, that the herbage of the ground which should be allotted and assigned for any public roads as aforesaid, should and might, from and after the making such allotments, be enjoyed by the respective persons then having common rights within the said manor and township of *Wheldrake*, their heirs, executors, administrators, and assigns respectively, in such manner as the said commissioners, or any two of them, should by the said award or instrument direct or appoint ; with a proviso that no cattle should be placed in the roads before the expiration of seven years after making the award ; that at the time of the making this act of parliament, plaintiff was entitled to rights of common over the waste lands ; that the commissioners did allot unto the plaintiff a share of the said inclosed waste lands, and did allot the *locus in quo* to be a public road ; but that they did not within seven years or afterwards, after the making of the act of parliament, in any manner direct how the herbage of the *locus in quo* should be enjoyed by the parties entitled thereto ; and that notwithstanding this, the plaintiff, having rights of common, &c., put the cow into *locus in quo*, and that therefore defendant, *de injuria*, seized the cow (b).

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(b) This replication was as follows :—“ That defendant ought not to

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Replication, stating issue on the traverses in all pleas in bar except the last; and as to that, de-

acknowledge or avow the taking, &c. because plaintiff says, that long before the said time when, &c. by a certain act of parliament, made at the parliament of our lord the now king, at a session thereof holden at *Westminster*, in the ninth year of his reign, intitled 'An act for dividing and inclosing several open fields, meadows, grounds, and inges, and the moor or common and waste ground within the manor and township of *Wheldrake*, in the county of *York*,' reciting, that whereas within the manor and township of *Wheldrake*, in the county of *York*, there were four open and uninclosed fields of arable, meadow, or pasture ground, commonly called the *Mill Field* or *West Field*, the *East Field*, *Dove Cote Field*, and *Well Field*, containing together, by estimation, about five hundred acres, or thereabouts; and also a certain uninclosed parcel of meadow ground, called the *Great Ings*, *Fore Ings*, and *Low Marr*, containing by estimation one hundred and eighty acres, or thereabouts; and also a moor or common, or large piece of waste ground, called *Wheldrake Moor*, or *Common*, containing by estimation one thousand five hundred acres, or thereabouts; and that *B. T.* esq. was lord of the manor of *Wheldrake* aforesaid, and owner of several ancient messuages, cottages, frontsteads, scites of messuages or cottages, tofts, lands, and tenements, within the said manor and township, fields and inges; and that the most reverend father in God *H.* by divine Providence, then Lord Archbishop of *York*, in right of his see, was seised of the perpetual advowson, right of patronage, collation, and presentation to the rectory of *Wheldrake* aforesaid, and the Rev. *H. T.*, doctor of divinity, was the then rector thereof, and in right thereof was seised of the parsonage house there with the appurtenances, and of certain glebe lands, lying dispersed in the said open fields, or some of them; and was also, in right of the said rectory, seised of or entitled to all the great and small tithes arising, renewing, and increasing, or happening within the said manor and township, except the tithes of certain closes of grounds within the said manor and township, called the *Farr Closes*, belonging to *R. S.* gentleman, containing about eight acres, for which a modus of five shillings yearly was payable to the said rector, in lieu of all tithes, great and small, arising and renewing on the said *Farr Closes*, and except the tithes of seven acres of ground, or thereabouts, parcel of the said *Great Ings*, belonging to *H. W.* the younger, of *Thicket*, in the county of *York*, esq. commonly called *H. W. R.* and — his wife, which they claimed to hold discharged of all tithes; and also except the tithes of a certain close, called *Munse Croft*, within the said manor, containing about eight acres, seven acres whereof, or thereabouts, belonged to *W. W.* of *Sunderland*, in the county of *Durham*, and *W. W.* of *Wheldrake* aforesaid, yeoman, and one other acre thereof, or thereabouts, belonged to the said *B. T.*, which they also claimed to hold discharged of all tithes; and that the said *R. S.*, *W. P.* of *Wheldrake* aforesaid, gent. and several other persons, were owners and proprietors of the residue of the messuages, cottages, and frontsteads, and shares of mes-

pendant replies that he ought not to be barred from acknowledging or avowing the taking, &c., because

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suages, cottages, and frontsteads within the said manor and township, and were, together with the said *B. T.* entitled to right of common upon the said common or moor, and to right of common and aravage in the said open fields; and that the said *B. T.* was the sole owner of the said parcel of meadow ground, called the *Low Marr*, and owner of much the greatest part of the said *Great Ings* and *Fore Ings*, some parts whereof did belong to several other persons; and the said *B. T.* and others were owners and proprietors of the said fields, lands, and ancient inclosures, within the said manor and township, and that the lands and grounds of the several proprietors in the said open fields and ings, lay dispersed and intermixed with each other, and the same, as well as the said common and waste grounds were, in their then situation, incapable of improvement; and it would tend greatly to the advantage of the parties concerned, and to the public utility, if the said open fields and ings, and the said moor or common and waste grounds, were divided and inclosed, and all the titheable lands and tenements in the said township exempted from tithes; but as that could not be effected without the aid and authority of parliament, it was enacted, That *R. B.* the younger, of the city of *York*, gentleman, and *J. O.* of *Burton Agnes*, in the county of *York*, gentleman, and *J. D.* of *Thorganby*, in the said county of *York*, gentleman, and their successors, to be elected in manner thereafter directed, should be, and they were thereby appointed commissioners for putting that act in execution, and for the several ends, intents, and purposes thereafter expressed; and it was also further enacted by the authority aforesaid, that the said commissioners, or any two of them, should, and they were thereby authorized and required, in the first place, to set out, assign, and allot unto and for the said *B. T.* lord of the said manor of *Wheldrake*, his heirs and assigns, as a compensation for his and their right and interest in and to the soil of the said moor or common and waste ground, and consent to the division and inclosure thereof, one sixteenth part (quantity, quality, and situation considered) of the said moor or common, in one entire plot, over and above and exclusive of such share or allotment of the said moor or common, as was thereafter directed to be allotted to him, in lieu of and as an equivalent for his right of common in or upon the said moor or common and waste ground, as owner of messuages, cottages, or scites of messuages, cottages, or frontsteads, in *Wheldrake* aforesaid; and that the said commissioners, or any two of them, should also set out and allot unto and for the said *H. T.* and his successors, rectors of the said rectory of *Wheldrake*, such part of the said open fields, moor or common, and waste ground respectively, as they, or any two of them, should deem to be, at the time of such inclosure, a full and adequate compensation for all tithes, great and small, of what nature or kind soever, *Easter* offerings, and all other ecclesiastical dues and payments whatsoever, issuing, arising, or renewing, or due and payable, or which might become due or payable from thenceforth for all times to come, out of or for all and every

**And the said commissioners did, by their said award,
order and award, that the surveyors of highways with-**

**the said open fields and moor or common and waste grounds, and all other
titheable lands, grounds, and tenements within the said manor and town-
ship, save and except the tithes of the old inclosed ground, meadow
grounds, and titheable part of the said iugs, for which a compensation by
yearly sums of money was to be made ; and save and except all mortuaries
and surplice fees due and payable to the said *H. T.* and his successors,
rectors as aforesaid ; which allotment or allotments should be by him and
them accepted in lieu and full satisfaction of such tithes and ecclesiastical
dues (except as aforesaid), and should be subject to the same sort of taxes,
assessments, charges, and payments, as the said tithes then were and
would have been subject to in case that act had not been made, and in
the same proportion as the other lands and grounds in the said township.
And it was also thereby enacted, that the said commissioners, or any two
of them, should and might also set out, divide, and allot, the residue of
the said moor or common and waste ground (save one acre thereof, to
be set out in such part thereof by the said commissioners, or any two of
them, as they should think convenient, for the digging and getting of
gravel ; and one acre more for the digging and getting of sand for the re-
pairing of the high roads within the said manor and township, and which
the said commissioners, or any two of them, were thereby authorized and
required to set out accordingly, after such sixteenth part, to be allotted to
the said *H. T.* as lord of the said manor as aforesaid, and such part or
parts as should be set out to and for the said *H. T.* and his successors as
aforesaid, and such part thereof as might be set out for high roads or pri-
vate roads, were deducted) unto and amongst the said *B. T.* and all and
every other the owners or proprietors of messuages, cottages, and scites,
or frontsteads of messuages and cottages within the said manor and town-
ship of *W'heldrake* aforesaid respectively, having right of common on the
said moor or common and waste ground, in proportion to the number of
such messuages and cottages, and scites or frontsteads of messuages or
cottages belonging to the said *B. T.* and the said several other owners re-
spectively, in such manner that the owner or owners of each such mes-
suage or scite, or frontstead of a messuage, might, in respect thereof, have
one-third more in value of such residue of the said moor or common or
waste ground (quantity, quality, and situation considered) than the owner
or owners of each such cottage or scite, or frontstead of a cottage, with-
out regard being had to the lands of any such owners, or to the magnitude
or goodness of any house ; which said allotments should be in lieu and full
satisfaction of their respective common rights in or upon the said moor
or common and waste ground ; and it was in and by the said act further
enacted, that the said commissioners, or any two of them, should and
might set out and allot the residue of the said open fields (except one rood
of land, or thereabouts, parcel of the said *Mill Field*, whereon a windmill
was then erected ; and also except a horse-way, leading from the town to
the said mill), and also the same meadow grounds or iugs, unto and
amongst all the owners and proprietors of lands and grounds in the said**

TEMP. LORD MANSFIELD.

in the said township of *Wheldrake* aforesaid, for the time being, for ever, should permit and suffer all the

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open fields and ings respectively, in proportion to their several and respective lands and grounds and interest therein, in such shares and proportions respectively, as they the said commissioners, or any two of them, should adjudge and determine to be a full recompense, satisfaction, and equivalent for their several and respective lands and interests therein; and it was in and by the said act further enacted, that immediately after such division and allotments of the said several open fields, meadows, grounds, and ings, and the moor or common and waste grounds, in pursuance of that act, should be made, signified, and declared by the award thereinafter directed to be made, all right of common of what nature or kind soever, claimed by or belonging to any person or persons whatsoever in, over, and upon all or any of the lands and grounds within the said manor or township; and also all tithes, both great and small, and ecclesiastical dues and payments of what nature or kind soever (the surplice fees and mortuaries then due and payable to the rector of *Wheldrake* aforesaid, and the said modus of five shillings for the said *Farr Closes*, belonging to the said *R. S.*, only excepted), arising, renewing, or happening for, out of, or in respect of all and every, or any messuages, cottages, tofts, lands, grounds, and hereditaments whatsoever, within the said manor and township of *Wheldrake* aforesaid, or either of them, or then due and payable, or which might otherwise thereafter become due and payable within the said manor and township of *Wheldrake* aforesaid, for or in respect of any matter or thing or pretence whatsoever, should cease, determine, and be for ever extinguished. And it was in and by the said act further enacted, that the said commissioners, or any two of them, should and might set out and appoint to be made, proper and convenient public roads and ways, in and through the said manor or township, grounds or lands, thereby intended to be inclosed; all which public roads should not be of less breadth than sixty feet between the ditches, and if the breadth of sixty feet between the ditches should not be sufficient to take in and include the ornamental trees planted on each of the said roads leading from a certain bridge, called *Poll Bridge*, within the said manor of *Wheldrake*, to the town of *Wheldrake* aforesaid, then the said commissioners, or any two of them, should and might continue the said road of such breadth as they should think convenient, by taking in the said trees unto the same road; and should and might also make, set out, and appoint, change, or alter any public or private ways or roads, and footways; and also such hedges, fences, ditches, bridges, causeways, banks, sluices, drains, watercourses, streams of water, cloughs, engines, gates, stiles, and other requisites, in, through, upon, or near any of the said intended inclosures, as the said commissioners, or any two of them, should judge to be requisite and proper for the convenience of any of the said owners, or the improvement of the lands so intended to be inclosed; and also to set forth, order, direct, and appoint, all and every such further and other needful act, matter, and thing, for the better and more speedy dividing, allotting, inclosing, and improving of the said open fields, meadow grounds, ings, moor or

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grass and herbage which should from time to time be growing or renewing on all the said public and pri-

common and waste ground, thereby directed to be inclosed, or any of them, as they the said commissioners, or any two of them, should think convenient : and that all such public roads should be made, and at all times thereafter be repaired, and kept in repair, in such manner as the other public highways, within the manor or township of *Wheldrake* aforesaid, were by law directed to be repaired ; and all such private ways, hedges, fences, ditches, bridges, causeways, sluices, drains, watercourses, streams of water, cloughs, engines, banks, gates, stiles, and other requisites and improvements as aforesaid should be made, and at all times thereafter supported, repaired, and cleansed by all or any of the said proprietors of the allotments to be made by virtue of that act, in such manner as the said commissioners, or any two of them, should by their award or instrument order, direct, or appoint ; and that after the making the roads and highways so to be set out and appointed, it should not be lawful for any person or persons to use any other roads or ways, either public or private, over the said allotments, either on foot or with horses, carriages, or cattle ; and all the former roads and ways through the said intended allotments, which should not be set out and appointed as the roads and ways through the said intended inclosures, should be deemed as part of the lands to be divided, and should be allotted accordingly. And it was also further enacted and declared, by and with the consent of the said *B. T.* lord of the said manor of *Wheldrake*, that the herbage of the grounds which should be allotted and assigned for any public roads as aforesaid, should and might, from and after the making such allotments, be enjoyed by the respective persons then having common rights within the said manor and township of *Wheldrake*, their heirs, executors, administrators, and assigns respectively, in such manner as the said commissioners, or any two of them, should by the said award or instrument direct or appoint : Provided nevertheless, that no sheep or cattle of any kind should be kept or depastured in or upon any of the said roads, for the term of seven years from the executing the said award : And it was also further enacted, that the said commissioners, or any two of them, should, within the space of six calendar months after the division and allotment of the said open fields, meadow grounds, and inges, moor or common and waste grounds, should be made as aforesaid, or as soon afterwards as conveniently might be, form and draw up an award or instrument in writing, which should express the quantity in statute measure of acres, roods, and perches contained in all the said lands and grounds so intended to be allotted and inclosed as aforesaid, and the quantity and contents of each and every part and parcel thereof assigned and allotted to each of the parties intitled to and interested in the same ; and should also describe the situation, abutments, and boundaries of the said several and respective allotments, and should contain such orders as the said commissioners, or any two of them, should think fit, for fencing and inclosing the said several allotments, and for supporting, maintaining, and keeping the new and old fences of the same in repair, and for making, laying out, and

vate roads within the said manor and township, to be enjoyed by such of the occupiers of messuages,

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maintaining proper public and private roads and ways, hedges, fences, ditches, bridges, gates, and stiles, and should contain all such other orders, regulations, and determinations, as the said commissioners, or any two of them, should think proper and necessary to be inserted therein, according to the true meaning of that act; of which said award or instrument two parts should be fairly engrossed and written upon parchment, and should be made, and signed and sealed, by the said commissioners, or any two of them; and one of the said two parts of the said award should be deposited in the chest of the parish church of *Wheldrake* aforesaid, for the inspection and perusal of the several proprietors in the said manor or township, and the other part thereof should be inrolled at length in the public Register Office, kept at *Beverley*, in the East Riding of the said county of *York*, within six calendar months next after the signing and sealing the said award; and the register of the said office and his deputy was thereby required to inrol the same in the proper book for inrolling bargains and sales of lands; and each of the said ingrossments, or a true copy of the part so inrolled, certified under the hand of the said register, or his deputy, should from time to time be admitted and allowed, in all courts whatsoever, as legal evidence of the same; and the said award or instrument, after the enrolling as aforesaid, should be lodged or deposited in the hands of the lord of the manor of *Wheldrake* aforesaid, for the time being; and the said register or his deputy should be entitled to such fees for such enrollment, and copies thereof, as were allowed for enrolling any bargain and sale, or copy thereof; and the said register and his deputy should permit and suffer any person or persons whatsoever, from time to time, and at all times within the office hours of attendance, to peruse and inspect the enrollment of the said award at the said public office, paying to the said register or his deputy for every such perusal or inspection, one shilling, and no more; which award, when executed and inrolled in manner aforesaid, should be binding, final, and conclusive to all the proprietors and parties interested in the said division and allotments as to the lands and grounds so to be divided and allotted, and the tithes and ecclesiastical dues of the said manor and township, and all other matters and things thereby intended to be comprised therein, as by the said act of parliament, relation being thereto had, doth more fully and at large appear. And the said *R.* further says, that long before, and at the said time of the making of the said act of parliament, he the said *R.* was and still is seised in his demesne as of fee, of and in a certain ancient messuage with the appurtenances, situate, standing, and being within the manor and township of *Wheldrake* aforesaid; and the said *R.* being so thereof seised, he the said *R.*, and all those whose estates the said *R.* now hath, and at the time of the making of the said act of parliament had, of and in the said ancient messuage, with the appurtenances, at the time of the making of the said act of parliament, had and used, and from time whereof the memory of man is not to the contrary, had been accustomed to have and use, and at the time of the making of the said act of parliament, of

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cottages, and frontsteads within the said township of *Wheldrake*, from time to time, as should yearly agree

right ought to have had for himself and themselves, and his and their tenants and occupiers of the said ancient messuage with the appurtenances, common of pasture in and upon the said moor or common, called *Wheldrake Moor* or Common, within the said manor, for all his and their commonable cattle, levant and couchant upon the said ancient messuage, with the appurtenances, every year, at all times of the year, as to the said ancient messuage with the appurtenances belonging and appointing; and the said *R. R.* further says that the said *R. B.* the younger, *J. O.* and *J. D.*, the commissioners named and appointed in and by the said act, after the making thereof, did by virtue and in pursuance thereof, make a division and allotment of the said open fields, meadow ground and ings, moor or common, or waste grounds, according to the form of the said act, and that they the said three commissioners, as soon as conveniently might be after the said division and allotment had been made as aforesaid, (to wit) on the 27th day of *October*, in the year of our Lord, 1773, at *Wheldrake* aforesaid, did form and draw up an award or instrument in writing, which did express the quantity, in statute measure, of acres, roods and perches, contained in all the said lands and grounds so intended to be allotted and inclosed as aforesaid, and the quantity and contents of each and every part and parcel thereof, assigned and allotted to each of the parties intitled to or interested in the same, and did also describe the situation, abutments, and boundaries of the said several and respective allotments, and did contain such orders as the said three commissioners did think fit for fencing and inclosing the said several allotments, and for supporting, maintaining, and keeping the new and old fences of the same repaired, and for making, laying out, and maintaining proper public and private roads and way-hedges, ditches, bridges, gates, and stiles, and did contain all such other orders, regulations, and determinations, as the said three commissioners thought proper and necessary to be inserted therein; and did then and there sign and seal two parts of such award or instrument fairly engrossed and written upon parchment, one of which parts was deposited in the chest of the parish church of *Wheldrake* aforesaid, and the other part thereof was enrolled at length in the public register office kept at *Beverley* aforesaid, within six calendar months next after the signing and sealing the said award; in and by which said award the said commissioners (amongst other things) did allot and assign to the said *R. R.* in right of his said ancient messuage, with the appurtenances, a certain share and proportion of the said moor, or common and waste, called *Wheldrake Moor* or Common, within the manor and township of *Wheldrake* aforesaid, divided and enclosed by virtue of the said act; and did, in and by their said award, allot and assign the said place in which, &c., being parcel of the said common field, called the *Dovecote Field*, as aforesaid, to be for ever a public road, leading from *Wheldrake* aforesaid, to *Durmington* in the said county of *York*, as by the said award more fully appears; and the said *R. R.* avers that the term of seven years and more, at the said time when &c. had elapsed from the

to pay to the said surveyors the best price or consideration for the same; and the said commissioners did thereby order, award, and direct, that the said surveyors for the time being should and were thereby authorized and required on the 2d day of *February*, in each year, by public auction, at *Wheldrake* aforesaid, to agree with the best bidder, being an inhabitant of the township of *Wheldrake*, for the grass and herbage on the said roads; and the person or persons who should so agree for the same, from time to time, should and might have and enjoy all such grass and herbage, from the 5th day of *April* then next following, for one whole year, and so from year to year as long as the surveyors of the said highways from time to time should think fit, they giving six months' notice when

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time of executing of the said last-mentioned award of the said *R. B.* the younger, *J. O.* and *J. D.*, as aforesaid; and the said *R. R.* avers that the said commissioners, or any two of them, did not, according to the said act, by the said award or instrument, direct or appoint any manner in which the herbage of the said place in which, &c., should and might, from and after the making such allotments, be enjoyed by the respective persons having, at the time of the making of the said act of parliament, common rights within the said manor and township of *Wheldrake*, their heirs, executors, administrators, and assigns; and the said *R. R.* further says, that he the said *R.* being so seised of the said ancient messuage, with the appurtenances, and as such, before the making of the said act of parliament, having common rights within the said manor and township of *Wheldrake* aforesaid, afterwards, and after the expiration of the said term of seven years from the executing of the said award, and a little before the said time, when, &c., put the said cow into the said place in which, &c., (being the commonable cow of him the said *R.*, le- vant couchant upon his said messuage, with the appurtenances, to eat and depasture the herbage there growing in the said place, in which, &c., as he lawfully might, for the cause aforesaid; and the said cow continued in the said place in which, &c., eating and depasturing the said herbage there growing in the said place in which, &c., until the said *J.*, at the said time when, &c., of his own wrong, took the said cow in the said place in which, &c., and unjustly detained her against sureties and pledges, until, &c., in manner and form as the said *R.* hath above thereof complained against him; and this the said *R.* is ready to verify; wherefore he prays judgment and his damages, by reason of the unjust taking and detaining of the said cow, to be adjudged to him, &c.

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To this replication the plaintiff demurred, and defendant joined in demurrer.

Wood, for the plaintiff. The only material plea in bar is the last. The question to be decided on this demurrer is, whether the commissioners have properly executed the power given them by act of parliament. It is quite clear from the act of parliament, that those entitled to rights of common ought all to have the herbage of the road. The act intended that they should all have the use of this herbage, and not that one individual should have it; and the act gave the commissioners power only to award in what manner the enjoyment of the herbage should be exercised amongst the commoners. Now the commissioners have awarded that the herbage shall be leased out by the surveyors of the highways to that commoner who shall be the highest bidder. This would certainly exclude the rights of all the commoners but his to whom the lease is made. Surely this is not an execution of the act.

Lamb, contrà. I admit this is not in the strict words of the act, an execution of the power given to the commissioners. But I should think the award of the commissioners within the meaning and intention of the legislature; for the words of the act, if taken in their strict sense, would create great confusion among the commoners.

SED PER CURIAM. It is no execution of the power. The words of the act are to be taken in the meaning contended for by the plaintiff.

Judgment for the plaintiff.

REX *against* WINDSOR.

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Mick. Term.

THE defendant in this case was convicted under the 22 *Geo. III.* ch. 47, sec. 13, before a justice of the peace, for insuring in a public lottery, which was described in the conviction to be a public lottery then authorized and established by an act of parliament made in the 25th year of his Majesty's reign, intituled, An act for granting to his Majesty a certain sum of money, to be raised by a lottery" (a). Coun-

The description of an act in a conviction, as having been passed in the 25th year of the king's reign, when in fact the parliament in which the act was passed, was continued by prorogation from the 24th to the 25th year of the reign, is not misdescription.

(a) The statute on which the defendant in the above case was convicted is now repealed, by 42 *Geo. 3*, s. 54. A provision however to the like effect as that of the seventh section of the 22 *Geo. 3*, is to be found in the 34th section of the 1 and 2 *Geo. 4*, c. 120, by which it is enacted, that "No person shall sell the chance of the benefit which may belong to any ticket in the lottery for any less time than the whole time of drawing, then to come, or sell any other chance of any benefit which may belong to any such ticket, other than that what is hereinafter expressly permitted, or insure for or against the drawing of any such ticket, or receive any money or goods, in consideration of any agreement to repay any sums, or deliver the same, or other goods, if any such ticket shall prove fortunate or unfortunate, or on any chance or event relative to the drawing of any such ticket, whether as to their being drawn fortunate or unfortunate, or the time of their being drawn, or otherwise howsoever promise or agree to pay any sum, or deliver any goods, or do or forbear doing any thing

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sel moved to quash this conviction, on the ground that it stated the act to be passed in the 25th year of the

for the benefit of any person, whether with or without consideration, or any contingency relative or applicable to the drawing of any such ticket, or publish any proposal for such purposes; and if any person shall offend against this act in any such matters, the contract shall be void, and the party offending, if not licensed to divide tickets into shares, shall be deemed a rogue and vagabond, and shall be punished as such, as after directed; and if so licensed, he shall forfeit 50*l*. The sale of lottery tickets, by which the purchaser is to be entitled to all the benefit of them, except the 10*l*. prizes, is made void, by the 22 *Geo. 3.* *Derry v. Shee*, 2 T. R. 617. As to the form of affidavits to hold to bail for illegal insurances in the lottery, see 2 T. R. 654. 4 T. R. 228; *id.* 349. The following is the conviction on which the defendant in the above case was convicted:—*London*, to wit, Be it remembered, that on the 6th day of *March*, in the 26th year of the reign of our sovereign lord *George the Third*, of *Great Britain, France, and Ireland*, king, defender of the faith, and so forth, and in the year of our Lord 1786, at the Guildhall of the city of *London*, in the parish of *St. Michael Bassishaw*, in the ward of *Bassishaw*, in the said city, *Nath. Barrett of West Smithfield, London*, shoe-maker, who prosecutes as well for our said lord the king as for himself in this behalf, in his proper person cometh before us, *Thomas Wright*, esq. mayor of the said city, and *John Boydel*, esq. one of the aldermen of the said city, two of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said city, and also to hear and determine divers felonies, trespasses, and other misdeeds committed within the said city, and now here, as well for our said lord the king as for himself, the said *N. B.* exhibiteth before us the said justices, a certain information, and therein complaineth and giveth us the said justices to understand and be informed, that on the 10th day of *February*, in the year of our Lord 1786, one *J. W.* late of the parish of *St. Ann and Agnes*, in the ward of *Aldersgate*, within the said city, labourer, did, on the said 10th day of *February*, in the parish and ward last aforesaid, in the said city, and within the jurisdiction of us the said justices, take and receive from one *E. J.* a sum of money, to wit, the sum of ninepence, of lawful money of *Great Britain*, and in consideration thereof the said *J. W.* did then and there promise and agree to pay to the said *E. J.* the sum of one pound and one shilling of like lawful money, if a certain ticket, numbered 385, in the lottery then authorized and established by an act of parliament, made in the 25th year of his said majesty's reign, intituled "An act for granting to his majesty a certain sum of money, to be raised by a lottery," should be drawn fortunate or unfortunate, on the 6th day of the drawing of the said lottery, contrary to the form of the statute in that case made and provided; whereby, and by force of the statute in that case made and provided, the said *J. W.* hath, for his said offence, forfeited the sum of fifty pounds of lawful money of *Great Britain*, one moiety thereof to the use of our said lord the king, and the other moiety thereof to the use of the said *N. B.*, the said informer; and the said *N. B.*, who prosecutes as aforesaid, prays that the said *J. W.* may be convicted of the

reign, when in fact the parliament, under which the act was passed, was held in the 24th year of the reign,

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said offence, according to the form of the statute in such case made and provided ; and afterwards, to wit, on the 18th day of *March*, in the 26th year aforesaid, at the Guildhall aforesaid, situate as aforesaid, the said *J. W.* being duly summoned in this behalf to appear before us, *Thomas Wright* and *John Boydell*, being such justices as aforesaid, at the time and place last aforesaid, to answer the matter of complaint aforesaid, contained in the said information, doth now here (that is to say) on the day and year last aforesaid, at the Guildhall aforesaid, situate as aforesaid, duly appear before us the said justices, in pursuance of our summons duly issued for that purpose ; and having heard the said information read, saith that he is not guilty of the said offence charged upon him in and by the said information ; whereupon we, the said *Thomas Wright* and *John Boydell*, being such justices as aforesaid, do now here (that is to say) on the day and year last aforesaid, at the Guildhall aforesaid, situate as aforesaid, proceed to examine into the truth of the matters of complaint contained in the said information ; and thereupon *E. J.*, a credible witness in this behalf, now here cometh in her proper person before us the said *Thomas Wright* and *John Boydell*, being such justices as aforesaid, and upon her corporal oath upon the holy evangelists of God, now here duly administered to her the said *E. J.* by us, the said *Thomas Wright* and *John Boydell*, being such justices as aforesaid (we the said justices having sufficient lawful and competent power and authority to administer the said oath to the said *E. J.* in this behalf), to say the truth, the whole truth, and nothing but the truth, of and concerning the premises in the said information specified, now here before us the said justices, in presence of the said *J. W.*, now also here before us the said justices as aforesaid, being so sworn upon her oath as aforesaid, saith, deposeth, and sweareth of and concerning the premises as follows (that is to say) that she the said *E. J.* well knows the said *J. W.* the defendant, who is a lottery office keeper, and on the 10th of *February*, in the year of our Lord 1786, kept a lottery office in *St. Martins-le-grand*, which is in the parish of *St. Ann* and *Agnes*, in the ward of *Aldersgate Within*, in the city of *London* ; that the said *E. J.* on that day went to the office so kept by the said *J. W.*, where she then saw the said *J. W.*, at which time and place, in the presence of the said *J. W.*, and by his express direction, she gave and paid on the account, and to the use of the said *J. W.*, to a person whom he the said *J. W.* called his clerk, and who then appeared to act as such clerk in the said office of the said *J. W.*, the sum of nine-pence, in consideration of which the said *J. W.* did then in his said office promise and agree to and with her the said *E. J.* pay to her the sum of one pound and one shilling if a ticket numbered 385 in the lottery established by an act of parliament made in the twenty-fifth year of his present majesty's reign, should be drawn fortunate or unfortunate on the sixth day of the drawing of that lottery ; and the said *J. W.* having heard the whole of the said evidence so given against him, is now here (that is to say), on this said 18th day of *March*, in the

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and continued by prorogation till the 25th year of the reign, which was contended to be a misdescription.

SED PER CURIAM. This is no well-founded objection; in effect the act was passed in the 25th year of the reign. We have decided this before.

Conviction affirmed.

26th year aforesaid, at the Guildhall aforesaid, situate as aforesaid, asked by us the said justices if he hath any thing to say or offer for himself why he the said *J. W.* should not be convicted of the offence so as aforesaid charged upon him in and by the said information; and he the said *J. W.* maketh no defence against, nor doth he offer or produce any evidence or witness to gainsay or contradict the offence so as aforesaid charged upon him in and by the said information; whereupon all and singular the premises being now fully understood and considered by us the said justices, it sufficiently appears to us the said justices, that the said *J. W.* is guilty of the said offence so as aforesaid charged upon him in and by the said information; therefore it is now here (that is to say) on the same 18th day of *March*, in the 26th year aforesaid, at the Guildhall aforesaid, situate as aforesaid, considered and adjudged by us the said justices, that the said *J. W.*, by the oath of the said *E. J.*, a credible witness as aforesaid, is and be convicted of the offence so as aforesaid charged upon him the said *J. W.*, in and by the said information, according to the form of the statute in such case made and provided; and we the said justices do award and adjudge that the said *J. W.*, for his said offence, hath forfeited and do pay the sum of 50*l.* of lawful money of *Great Britain*, to be distributed and applied, one moiety thereof to the use of our said lord the king, and the other moiety thereof to the use of the said *N. B.*, the said informer, according to the form of the statute in such case made and provided. In witness whereof we the said justices to this record of conviction do set our hands and seals, at the Guildhall aforesaid, situate as aforesaid, this 18th day of *March*, in the 26th year of the reign of our said lord the king, and in the year of our lord, 1786.

BOWERBANK and another against WALKER and another.

1787.

Hilary Term

ASSUMPSIT for goods sold and delivered to defendants and one *Parker Quince*, deceased. Plea, that the city of *London* is, and time immemorial hath been, an ancient city, and that there now is, and time immemorial hath been, a certain custom used and approved within the same city, that is to say, that if any person be indebted to any other person within the same city, in any sum of money upon simple contract, without specialty made between such persons, within the said city, that such person, to whom such sum of money is so due and owing, may and can have and maintain an action of debt by original bill, in the King's Majesty's court, holden before the mayor and aldermen of the city of *London* for the time being, in the chamber of the Guildhall, within the same city, according to the custom of the said city, against such persons so indebted, for the recovery of such sum of money so due and owing as aforesaid, and shall and may in such original bill, count upon a *concessit solvere*, (that is to say) the grant and agreement of the persons indebted to pay such sum of money so due and owing as aforesaid, without setting forth the special matter of such simple contract; which said custom, and all other customs of the said city, obtained and used from the time aforesaid by authority of parliament, held at *Westminster*, in the 7th year of the reign of *Richard* the Second, late king of *England*, after the conquest, to the mayor and commonalty and citizens of the said city, and their successors, were ratified and confirmed: and the said defendants further say, that heretofore,

On the removal of a cause by *habeas corpus*, from an inferior to a superior court, if the plaintiff declares *de novo*, he is not bound to declare in the same form of action as that in the inferior court (a).

(a) See *Prac. Reg.* 221. *Tidd's Prac.* 6th ed. 411.

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to wit, on the 19th day of *November*, in the 26th year of the reign of our sovereign lord *George the 3d*, now king of *Great Britain*, &c. in the court of our said lord the king, held before *Thomas Wright*, esq. then mayor, and the aldermen of the said city, in the chamber of the *Guildhall*, within the said city, according to the custom of the same city, the said *T. B. and S.* affirmed a certain bill original against the said defendants, surviving partners of *P. Q.* deceased, in a plea of debt, upon demand, of 500*l.* of lawful money of *Great Britain*, for recovery of the said sum of 500*l.* supposed to be due to the said *T. B. and S. H.* from the said defendants, as surviving partners as aforesaid, upon simple contract, without specialty made between the said defendants and the said *P. Q.* in his life time, and the said *T. B. and S.*, within the said city: and the said defendants in fact further say, that after the affirmance of the said bill original, the said plea was removed from and out of the said court, before the mayor and aldermen aforesaid, into the court of our said lord the king, before the king himself, by virtue of his majesty's writ of *habeas corpus cum causa*, issuing out of the said last mentioned court, and returnable therein, immediately on the receipt whereof in *Hilary Term* now last past; and thereupon the said *T. B. and S.* have declared against the said defendants in manner and form aforesaid, without the consent and agreement of them the said defendants; and this, &c.

To this plea the plaintiffs demurred generally, and the defendants joined in demurrer.

Baldwin, in support of the demurrer, contended that the plea was no answer to the plaintiffs action; for that on the removal of a cause by *habeas corpus* from an inferior court to a superior court, the plaintiff

might declare in a different form of action than that in which he declared in the court below. He cited Pra. Reg. 221.

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Shepherd, contra. The defendants were impleaded in the court below in an action of debt, and now the plaintiffs declare in case. Surely the plaintiffs ought to have proceeded in the same form of action. How can we tell but that it is not for some other cause the plaintiffs declare. We are taken by surprise.

SED PER CURIAM. The plaintiffs may declare as they please; they cannot recover for more than what they would have recovered in the court below.

Judgment for plaintiffs.

REX against SADLER.

1787.

Hilary Term.

THE defendant in this case was convicted under the 3d section of the 5 Geo. III. c. 14, in a penalty of 5*l.* for an offence against the provisions of this section. The conviction, in setting forth the information, proceeded as follows:—*Staffordshire*, to wit: Be it remembered, that on, &c. at, &c. *W. Sims*, of, &c. gamekeeper to Sir *John Wrottesley*, Bart. cometh before me, &c. and giveth me to understand, &c. that on, &c. at, &c. one *J. S.*, &c. labourer, did kill, take, and destroy, or attempt to kill, take, and destroy the

A conviction, stating an offence to have been committed in the alternative, is bad.

A conviction under the 5 Geo. 3, c. 14, for killing fish in a private river without the consent of the owner, should state the offence to have been committed in an inclosed ground (a).

(a) See precedents of convictions of this nature. *Paley* on Conv. App. 38. *Chitty's Game Appendix*, 109, and *ante*, 1 vol. 158. It should appear on the face of the conviction, both in the information and evidence, that the complaint was made on behalf of the owner of the fishery, or by his authority, and that the fishing was without his consent. *Rex v. Daman*, *ante*, 1 vol. 147. 2 *B. & A.* 378, and notes, &c. there collected. 4 *Burr.* 2279, 2281. *Paley*, 79. See also 2 *Burr.* 397. 1 *Saund.* 262, note 1. As to evidence, see 1 *East*, 648.

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fish in a river or stream, commonly called the *Smestall*, in the parish of *Womborne*, in the county aforesaid, without the consent of the said Sir *J. W.*, bart., he the said Sir *J. W.* being then the owner of the fishery within the river or stream aforesaid, in the parish of *Womborn* aforesaid, in the county aforesaid, the same not being in any park or paddock, or in any garden or orchard or yard adjoining or belonging to any dwelling-house, whereupon afterwards, to wit, on the thirteenth *July*, in the year aforesaid, at, &c. aforesaid, he the said *J. S.* being by virtue of my warrant brought before me, the justice aforesaid, to answer to the said charge contained in the said information, and having heard the same, he the said *J. S.* is asked by me the said justice, if he can say any thing for himself why he should not be convicted of the premises charged upon him as aforesaid; and because he the said *J. S.* doth not say any thing in his own defence, touching or concerning the premises, and doth not pretend to have any just right or claim to take, kill, or destroy any fish within the river or stream aforesaid, but doth of his own accord freely and voluntarily acknowledge and confess all and singular the said premises to be true; and because all and singular the premises being heard, and fully understood by me the said justice, it manifestly appears unto me, that he the said *J. S.* is guilty of the offence aforesaid so laid to his charge; it is therefore adjudged by me the said justice, that he the said *J. S.* is guilty of the offence aforesaid, and that he be, and he is hereby convicted by me the justice aforesaid, of the premises, according to the form of the statute in that case made and provided; and I, the justice aforesaid, do award and adjudge, that for the premises aforesaid he the said *J. S.* hath forfeited the sum of five pounds of lawful money of *Great Britain*, to be paid as the statute aforesaid doth direct. In witness, &c.

Bower, on a former day, had obtained a rule to shew cause why the conviction should not be quashed, for two objections, *viz.* that it was wrong in stating the offence in the alternative; that the defendant did kill, &c. or attempt to kill, &c., and that it did not state the offence to have been committed in an inclosed ground. He now moved to make the rule absolute; and on the first objection urged, that it was a well-founded general rule, that in all legal proceedings, charging a party with an injury or crime, the nature of such injury or crime must be so described, that the defendant may know what he is called upon to answer; that the jury (or, in this instance, that the justice) may appear to be warranted in their conclusion of "guilty" or "not guilty," upon the premises delivered to them; and that the court or judge may see such a definite injury or crime, that they may apply the remedy or the punishment which the law prescribes. For this he cited *Cowp.* 682, 3. 1 Lord *Ray.* 171 (*b*). On the second objection, he contended, that to bring an offence within the meaning of the 5 *Geo. III.* it should be committed within some inclosed ground; and that the conviction being deficient in this statement, it was bad.

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THE COURT admitting the validity of these objections, the conviction was quashed.

(*b*) See also 3 T. R. 159. *Dougl.* 278.

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REX against SELWAY.**Hilary Term.**

In a conviction, it must appear that the evidence, on which the defendant

THE defendant in this case was convicted under the 25 Geo. III. c. 78. s. 9, for travelling about from town to town and selling goods by retail there, the defendant was convicted, was given in his presence; and where a conviction merely stated, that the defendant on such a day appeared before a magistrate on a summons, and that the magistrate proceeded to examine into the offence, and that it appeared to him, on the oath of the witnesses, that the offence was committed, it was held bad (a).—So the evidence, whereon the defendant is convicted, must appear on the face of the conviction (b).—In a conviction under the Hawker's Act, 25 Geo. 3, c. 78 (now repealed) (c), against a party, for travelling about from town to town, and selling goods by retail there, the places of sale not being his usual place of abode, the conviction should specify the goods sold (d).—It is not necessary, in a conviction, to state how the witnesses were sworn (e).

(a) There have been many difficult and troublesome questions arise on this point, which will be found collected in Mr. Paley's excellent Treatise on Convictions, page 111, &c. Any future difficulties, however, will now be prevented by the operation of the 3rd Geo. 4, c. 23, which gives a general form of conviction to be used by magistrates where no particular form is provided; and amongst other things it compels the magistrate (if such was the case) to state that the witness gave his evidence in defendant's presence. By this statute, after reciting "that great inconveniences often arise in summary proceedings before justices of the peace, deputy lieutenants, and others, from a want of a general form of conviction; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, in all cases wherein a conviction shall have taken place, and no particular form for the record thereof hath been directed, the justice or justices, deputy lieutenant or deputy lieutenants, or other person or persons duly authorized to proceed summarily therein, and before whom the offender or offenders shall have been convicted, shall and may cause the record of such conviction to be drawn in the manner following, or in any words to the same effect, *mutatis mutandis* (that is to say):

County [or as the case may be] } Be it remembered that on the day of
in the year of our Lord , at
in the county of , A. B., of , in the county
of , labourer [or as the case may be], personally came before me [or before us, &c.], C. D., one [or more, as the case may be.] of his majesty's justices of the peace for the said , and informed me [or us, &c.] that E. F., of , in the county of , on the day of , at , in the said , did [here set forth the fact for which the information is laid] contrary to the form of the statute in such case made and provided; whereupon the said E. F. after being duly summoned to answer the said charge, appeared before me [or us, &c.] on the day of , at , in the said , and having heard the charge contained in the said information, declared he was not guilty of the said offence [or as the case may

same places not being his usual place of abode.
The conviction was as follows :

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Be it rememberd, that on, &c., at, &c., J. C., of,

happen to be], did not appear before me [*or us, &c.*] pursuant to the said summons [*or did neglect and refuse to make any defence against the said charge*], whereupon I [*or we, &c., or nevertheless I or we, &c.*] the said justice or justices, did proceed to examine into the truth of the charge contained in the said information and on the day of , aforesaid, at the parish of , aforesaid, one credible witness, to wit, *A. W.*, of , in the county of , upon his oath deposeth and saith [*if E. F. be present, say, in the presence of the said E. F.*] that within months [*or as the case may be*] next before the said information was made before me [*or us, &c.*] the said justice, by the said *A. B.*, to wit, on the day of , in the year , the said *E. F.*, at , in the said county of ; *There state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each*] [*or if the defendant confess, instead of stating the evidence, say*] and the said *E. F.* acknowledged and voluntarily confessed the same to be true; and therefore, it manifestly appearing to me [*or us, &c.*] that he the said *E. F.* is guilty of the offence charged upon him in the said information, I [*or we*] do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said *E. F.* hath forfeited the sum of , of lawful money of Great Britain, for the offence aforesaid, to be distributed [*or paid, as the case may be*] according to the form of the statute in that case made and provided. Given under my hand [*or our hands, &c.*] and seal, the day of , in the year of our Lord

The second section empowers one justice to receive the original information, &c. where two or more justices are required to hear and determine it; and the third section enacts that in all cases where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and that the defendant has not appealed against the said conviction, where an appeal is allowed, or if appealed against the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. This act does not extend to Scotland.

(b) This point also, upon which there have been contradictory decisions, see *Paley*, 119, will be prevented in future from arising, by reason of the above statute of 3 Geo. 4, which compels the magistrate to set forth in his conviction the evidence whereon the party was convicted.

(c) The statute of 25 Geo. 3, c. 78, is now repealed, and the only acts in force against an offence of this nature are the 50 Geo. 3, c. 41, and 52 Geo. 3, c. 108. The 7th section of 50 Geo. 3, prohibits any hawker or other person travelling from town to town, or to other men's houses, either on foot or with horse or horses, from opening a room or shop, and exposing to sale any goods by retail in any town or place, such person

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&c., cometh before me, *William Kempe*, serjeant at law, one of the justices of the said lord the king, assigned to keep the peace in and for the said county of *Sussex*, and also to hear, &c., and giveth me the said justice to understand and be informed, that on the 30th of *August*, now last past, at, &c., *D. S.*, late of, &c., aforesaid, chapman, being a hawker, pedlar, petty chapman, and trading person, going from town to town and to other men's houses, did open a room or shop at *Brighthelmston*, aforesaid, being a market town within the said county, and

not being a householder there, or the same not being an usual place of his abode, or from selling, by himself or any agent, any goods by auction, under a penalty of 50*l.*, which penalty is by the 24th section to be recovered by action. The 52 *Geo.* 3, enacts that the above 7th section of the 50 *Geo.* 3, shall not extend to wholesale traders. To constitute an offence within the meaning of these acts, the selling must be by outcry, or some mode of sale by auction. *Allen v. Sparkhall*, 1 *B.* and *A.* 100. A trading person travelling from town to town, and having packages of books, &c. sent after him by public conveyance, and taking rooms at each town, and there selling such books, &c. by retail, by auction, is a trading person within the 50 *Geo.* 3, c. 41, s. 17. *Dean, qui tam, v. King*, 4 *B.* & *A.* 517.

(d) It is absolutely necessary that the description of the offence in a conviction should be set forth in the information with certainty, so that the defendant may know what he is called upon to answer; and nothing can be supplied by intendment or argument; and the pursuing the general words of the statute against which the offence has been committed, will not in general suffice, but the particular facts of the offence must be specified: see cases collected in *Paley* on Convictions, 65 to 78. Sometimes, however, the pursuing the words of the statute will suffice: see *Paley*, 78 to 83. An indictment for selling in unlawful measures *divers quantities* of ale, was held too general, and bad, on demurrer. *Rex v. Gibbs*, 1 *Stra.* 497: and see the law and authorities collected on this point, *ante*, vol. 1, 149, *nota*. It may be considered as a general rule, that in criminal proceedings all circumstances of exemption and modification, whether applying to the offence or to the person, that are either originally introduced or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived; but that such matters of excuse as are given by other distinct clauses or provisos, need not be specifically set out or negatived. See *Paley*, 85, and cases there collected. As to these points in civil proceedings, see 1 *Barn.* and *Ald.* 94. 1 *Chitty* on Pleading, 3d ed. 230, 359, 217, 236 to 241; 255 to 260.

(e) This same point seems to have been determined in *Rex v. Picton*, 2 *East*, 195. The statute 3 *Geo.* 4, gives the form in this respect.

within the distance of two miles from the middle of the most central market place, by the usual or most common road of such market town, and did on the said 30th day of *August*, and on divers other days, then and there vend and sell, and expose to sale, divers goods, wares, and merchandizes, by retail, the said *D. S.* not being a house-holder there, and the same not being an usual place of his abode or his carrying on business, and the said goods, wares, and merchandizes not being of the manufacture of this kingdom; for which he the said informant, as well on behalf of our said lord the king as his own, prayed judgment of me the said justice, and that the said *D. S.* might forfeit and pay the sum of ten pounds for such his offence, according to the form of the statute in such case made and provided; and the said *D. S.*, on the day and year first above said, appearing before me pursuant to a summons by me issued for that purpose, to answer the matter of the said information; and I the said justice having proceeded to examine into the cause of the said information, according to the form of the statute in that case made and provided, and it appearing to me, as well on the oath of *W. W.*, of, &c., gunner, *J. T.*, of, &c., and *C. R.*, of, &c., three credible witnesses, as otherwise, that on the said 30th of *August*, in the year aforesaid, at the said parish of *Brighthelmston*, in the said county of *Sussex*, being a market town, as aforesaid, the said *D. S.*, being a hawker, pedlar, petty chapman, and trading person, going from town to town, and to other men's houses, did open a room or shop at the New Ship inn, in the said parish of *Brighthelmston*, being a market town, as aforesaid, and within the distance of two miles from the middle of the most central market place, by the usual or most common road of such market town, and did on the said 30th day of *August*, and on divers other days, then and there vend, sell, and expose to

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sale divers goods, wares, and merchandizes, by retail, the said *D. S.* not being a householder there, and the same not being an usual place of his abode or his carrying on business, and the said goods, wares, and merchandizes not being of the manufacture of this kingdom, contrary to the form of the statute in that case made and provided : the said *D. S.* is therefore adjudged and convicted, and I do hereby adjudge and convict him the said *D. S.* to be guilty of the offence aforesaid, in the said information specified ; and do also adjudge that the said *D. S.* shall forfeit and pay for such offence the sum of ten pounds ; one moiety thereof belongs to our said lord the king, and the other moiety to the said *J. C.* who prosecuted for the same. Given under my hand and seal, &c.

The defendant appealed at the quarter sessions against this conviction ; but the justices confirmed it.

Plomer now moved to quash the conviction, and urged several objections to it. First, that the conviction did not state the charge was read over to the defendant, or that he pleaded to it, or was called upon to make defence, or that the evidence against the defendant was in any manner given in his presence. The case of *Rex v. Bipont*, 2 *Burr.* 1163, is an authority to shew that the evidence must be given in defendant's presence, in order that he may have the benefit of cross examination. In some cases, indeed, the court will presume that the defendant heard the evidence ; but here they cannot, for there is nothing in the conviction to warrant such a presumption. The second objection is, that the conviction stated that three witnesses were examined, and that the magistrate acted on their evidence as otherwise. This is incorrect ; for it does not appear what the otherwise was. The magistrate was bound to set out the precise evidence,

and not merely that it appeared to him from the evidence, which is not set out. The case in 4 Burr. 1063, is in point. The third objection is, that the oaths of the witnesses do not appear to have been legally administered. The conviction does not state they were sworn on the Holy Evangelists, or that the magistrate was legally advised to administer the oath; it merely states, they deposed on oath. The fourth objection is, that it don't appear from the conviction what goods the defendant sold. Even in an action of trespass, the goods should be specified with some degree of particularity, 4 Burr. 2455, and cases there cited; here they are not specified at all. There might be convictions without end for the same offence, if this were allowed; besides which, there are many goods which he is permitted, by the 15th section of the act, to sell.

Steele, in support of the conviction. As to the first objection, it is to be answered that the conviction and the evidence to support it, were made and given on the same day. The conviction states that the defendant appeared; and the court will presume that the evidence was given in his presence, and not that he was shut out. *Rex v. Kempson*, Cowp. 241, is an authority to shew that this would be the presumption. As to the second objection, what reason is there that it should be necessary to state the evidence at full length? It will be presumed that the magistrate acted discreetly and fairly upon the evidence, and that the defendant knew what the evidence was if he were present or heard it. 1 Salk. 369. As to the third objection, it is stated upon the face of the conviction that it appeared to the magistrates, upon the oath of the witnesses, that the offence had been committed; therefore it must be presumed that they were regularly sworn. As to the last objection, I consider it suffi-

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ent to follow the words of the act in this respect. The objection that there would be other convictions for the same offence, would apply if the goods were specified. It should come from the other side to shew that the goods were within the exception of the 15th section.

Plomer, in reply, was stopped

PER CURIAM. The conviction is clearly bad, upon the first, second, and last objections. The case of *The King v. Kempson* (*f*), is no answer to the first objection, as it is not in point. Here it is not stated, nor does it appear from the conviction, that the proceedings were all on the same day, but merely that on such a day the defendant appeared before the magistrate on a summons, and that the magistrate proceeded to examine into the offence, and it appeared to him on the oath of the witnesses, that the offence was committed. The case in *Salkeld*, urged in answer to the second objection, has been long ago overruled; and we will not now attempt to shake decisions which have been determined upon good judgment. The third objection is certainly not tenable, and the answers to it are good. The law would presume that the oath was properly administered, and that the magistrate had competent authority to administer it (*g*). The fourth objection is fatal.

Conviction quashed.

(*f*) *Cowp.* 241.

(*g*) 2 *East*, 195.

ROE on the demise of SAMPSON against DOWN and another.

1787.

Easter Term.

THIS was a special case for the opinion of the court. The case was in the following words, *viz.* — This action of ejectment came on to be tried before Lord *Loughborough*, at the last summer assizes for the county of *Essex*, when (under his Lordship's directions) a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court of King's Bench, on the following case: the premises in question are copyhold, consisting of a house and garden at *Plaistow*, in *Essex*, held of the manor of *Westham*, and of a piece of land of five acres, at *Plaistow*, held of the manor of *East Westham*.

W. S., (father of the lessor of the plaintiff) was on the 7th of *July*, 1781, admitted to the land, to hold to him, his heirs and assigns for ever, and at the same time surrendered it to the use of his will. On the same day he and *M. E.* his wife were admitted to the house and garden, to hold to him during his natural life, and from and after his decease to the wife during her natural life, and from and after the decease of the said *W.* and *M. E.*, then to the right heirs of the said *W.* for ever: and at the same time he surrendered the said house and garden to the use of his will. The said *W. S.*, on the 11th of *April*, 1783, duly made his will, whereby he gave and devised all that his copyhold messuage or tenement, with the lands, hereditaments, and appurtenances thereto belonging, situate at *Plaistow*, in the county of *Essex*, unto his said wife, *M. E. S.*, for and during the term of her natural life, *in case she should choose to live and reside therein*: from and immediately after the decease of the said wife, then he gave and devised the same unto his son, *W. J. S.*, and the heirs

Under a devise to a party of premises for life, provided he chooses to reside therein, and then to A. B. in fee, it is not necessary to complete A. B.'s right to the premises, on the death of the devisee for life, that such devisee should have actually resided in the premises. The intention to reside, and which intention would have been carried into effect had circumstances permitted, is sufficient.

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of his body ; *but in case his said wife should not choose to live and reside in his said house at Plaistow*, then he gave and devised the same, and the lands, hereditaments, and appurtenances thereto belonging, unto the defendants, and the survivor of them, upon trust that they (his said trustees) did and should, as soon as conveniently might be after his decease, sell and dispose of the same ; and he directed that the money arising by such sale should be considered as part of the residue of his personal estate therein after disposed of, and be applied accordingly ; and in the event of his said wife's declining to live and reside in his said house at *Plaistow*, and the same being sold and disposed of, and the money arising therefrom applied as therein-before directed ; he gave and bequeathed to his said son, *W. J. S.*, the lessor of the plaintiff, in lieu of the reversion of the said messuage, lands, hereditaments, and premises, the sum of 1,000*l.* of lawful money of *Great Britain*, when he should attain the age of twenty-one years ; *but in case his said son should happen to die before he attained the said age, then the said 1,000*l.* was to fall into the residue of his personal estate ; and as to all the residue of his personal estate not therein-before by him disposed of, he gave and bequeathed the same 'unto the said defendants, upon the trusts, and to and for the several ends, intents, and purposes therein-after mentioned.* That on the 21st of *February*, 1784, the said *W. S.*, the father, died without altering his will : that at the time of his death his wife, *M. E. S.*, was in *London*, not at *Plaistow*, and in a very bad state of health. *She said to her daughter, Miss S., that she was going to Bath, and if she returned from thence she would go to Plaistow.* Within ten days after the death of the testator, namely, on the 1st of *March*, 1784, *Mrs. S.* died, without having at any time since her husband's death resided on the estate at *Plaistow*. The lessor of the plaintiff is the eldest

son of the testator, and to whom the premises in question are devised after the death of the wife, in case she should choose to reside therein. The question for the opinion of the court is, whether under all the circumstances the lessor of the plaintiff be entitled to recover?

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Fielding, for the defendant. I contend that the lessors of the plaintiff have no title to the premises in question. The will devises the premises unto the testator's wife for life, provided she chooses to reside therein, and upon her death to the lessor of the plaintiff; but in case she shall not choose to reside therein, then unto the defendants. Now the testator clearly meant that his wife should reside in the premises, and the words in the will, if she shall choose to reside, mean, if she shall actually reside.

SED PER CURIAM. The wife's intention to reside on the premises is sufficient, provided the intention would, circumstances permitting, have been carried into effect; and as there is sufficient evidence of that intention, there must be

Judgment for plaintiff. .

LAYCOCK *against* TUFNELL.

1787.

Hilary Term.

DECLARATION in replevin, for seizing the cattle and goods of plaintiff; avowry for 158*l.* 10*s.*, half a year's rent due to defendant under a demise to rent (a). *Qu.* Where an avowry, stating the plaintiff to have held under a demise, at the yearly rent of 317*l.* without stating when the rent was payable, does not mean that the rent was payable yearly.

The plaintiff in replevin cannot plead in bar a set-off to an avowry for

(a) But he may plead a payment; as a payment of rent to the ground landlord or to prior incumbrancer, or of land or property tax. 4 T. R. 511. 6 Taunt. 524. Douglt. 624, 5. 3 Barn. and Ald. 516. 3 Moore, 278. 1 Brod. and B. 37.

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plaintiff. The avowry stated that the plaintiff held under a demise at the yearly rent of 317*l.*, without stating when the rent was payable. To this avowry the plaintiff pleaded in bar a set-off for goods sold, work and labour, &c. as to part of the sum due for rent, and as to the residue, a tender. The defendant demurred to that part of the plea, claiming a set-off, and the plaintiff joined in demurrer; and as to the tender, the defendant replied a subsequent demand; the plaintiff demurred to this replication.

Farhill, for defendant. A set-off is not pleadable in bar to an avowry for rent, for this is an action grounded on tort, and the statute only makes it pleadable in actions of debt or contract. *Graham v. Fraine*, B. R. Hil. 24 Geo. II., is in point: and in the above case it was said, that in the case of *Absalom v. Knight (b)*, at Reading Assizes, 1742, the judge at the trial had refused to let plaintiff in replevin go into any evidence of a set-off, in order to prove no rent due; this opinion was afterwards confirmed in full court, on a motion for a new trial.

The court were clearly of opinion, that there could not be a set-off of this nature in replevin, and were about to give judgment for the defendant, when

Wood, for the plaintiff, objected that it would be presumed from the avowry that the rent was reserved yearly, whereas the defendant had distrained for half a year's rent.

But the court paid no regard to the objection, as the plaintiff had by his pleading admitted the rent to be due.

Judgment for defendant.

(b) *Barnes*, 450, 4to. ed. *Bull. N. P.* 181.

**CARTER, Assignee of SHERIFF OF MIDDLESEX,
against YATES.**

1787.

Easter Term.

DECLARATION in debt on a bail bond, against one of the bail, at the suit of the plaintiff, under an assignment of the bond by the sheriff to the plaintiff. Plea, *actio non*, because that the said plaintiff exhibited his bill against him the defendant in this cause, on *Tuesday* next after the morrow of the purification of the *Virgin Mary* in *Hilary Term*, being the 6th day of *February*, in the 27th year of the reign of our lord the now king; and that the said assignment of the said writing obligatory in the said declaration mentioned, was not at any time before or on the said 6th day of *February*, the said day of exhibiting the said bill of the said plaintiff in this behalf, stamped according to the form of the statute in such case lately made and provided; and this the said defendant is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his said action thereof against him, &c.

Replication, *precludi non*, because that the said assignment of the said writing obligatory in the said declaration mentioned, was, at or before the exhibiting the said bill of the said plaintiff against the said defendant, duly stamped, according to the form of the statute in that case made and provided, to wit, at *Westminster* aforesaid, in the county aforesaid; and this he the said plaintiff prays may be inquired of by the country, &c.

Demurrer for the following causes: for that the said replication doth not answer the said plea, inasmuch as he the said defendant, in and by his said plea, pleaded two several and distinct matters, to wit, that the said

To a plea in action on bail bond, at the suit of the assignee of the sheriff, that the assignment of the bond was not stamped before the exhibiting of plaintiff's bill in the cause, the plaintiff need merely reply, that the assignment was stamped at or before the exhibiting the bill; and conclude his replication to the country. He need not take issue as to the time when the bill was exhibited, nor aver that the assignment was stamped "before the commencement of the suit," if the action thereon be in K. B. And if the plaintiff avers that it was stamped at *Westminster*, he may nevertheless conclude to the country.

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! plaintiff exhibited his said bill on the 6th day of *February*, in the 27th year of the reign of our lord the now king, and that the said assignment of the said writing obligatory was not stamped on or before that day, and therefore the said plaintiff ought to have selected one of those facts, and put the same in issue, and have concluded his replication with a verification, and not to have put the matter in issue, which he has done by his said replication; and for that the said plaintiff hath in and by his said replication alleged, that the said assignment was stated at or before the exhibiting of the said bill of him the said defendant, whereas he ought to have alleged that the same was stamped before the commencement of this suit; and for that the said replication is in the above-mentioned several respects doubly uncertain, and offers no material issue, and for that the said plaintiff hath therein alleged new matters, to wit, that the said assignment was stamped at *Westminster*, and yet hath concluded his said replication to the country, whereas he ought to have concluded the same in manner the same is pleaded with a verification, and for that it is in many other respects uncertain, insufficient, and defective, and wants form.

Joinder in demurrer.

Russell, for the defendant. The objections to the replication appear on the demurrer. The replication is bad, as it takes issue in the disjunctive, that the assignment "*at or before*," the exhibiting of the plaintiff's bill, was stamped. The plaintiff ought to have taken issue on one fact, and prayed the judgment of the court, and not concluded to the country; where the whole matter in any pleading is denied, then indeed it should conclude to the country.

But the Court paid no regard to these objections.

Judgment for the plaintiff.

DAVIES *against* LEWIS.

1787.

Trinity Term

THIS case came on to be heard, on a writ of error on a bill of exceptions, taken at a trial in the Court of Great Sessions for *Cardigan*, in *Wales*. From the writ of error, it appeared that the plaintiff had brought an action of replevin, and declared against the defendant, for seizing plaintiff's cattle in a close called *Lepn Nant Glas*, in the parish of *Lanbadarnfawr*. To this declaration the defendant pleaded two cognizances, as follows, *viz.* a cognizance as bailiff of *Thomas Hughes*, that the *locus in quo* did contain in itself divers, to wit, 1,000 acres of land, with all the appurtenances, at the parish aforesaid, and now and at the said time, when, &c. was, and from time whereof the memory of man, &c. hath been part and parcel of a certain tenement of land, called or known by the name of *Bwlchystullen*, otherwise *Bwlchystullen Sheep Walk*, otherwise *Libert Bwlchystullen*, of which said tenement, with the appurtenances, *B. Holloway*, jun. *T. Walker*, and *R. Dent*, esquires, before the said time when, &c. were seised in their demesne as of fee; and being so thereof seised, they the said *B.*, *T. W.*, and *R.* before the said time wherein (that is to say) on the 29th *September*, 1783, at, &c. aforesaid, demised the said tenement, with the appurtenances, to the said *T. H.*, to have and to hold the same to the said *T. H.* from thenceforth, for and during the term of one whole year from thence next ensuing, and fully to be complete and ended, and so from year to year, for so long a time as both parties should please; by virtue of which said demise the said *T. H.* afterwards, and

In a question as to private rights, whether or not a place is parcel of a sheep walk, evidence of reputation is admissible (a).

(a) Considerable difficult questions have arisen, as to the admissibility of common reputation as evidence of prescriptive rights strictly private. In some cases it will be admitted, but not in others. See cases and law collected on this subject, 1 *Phillips on Evidence*, 5th ed. 251.

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before the said time when, &c. to wit, on, &c. entered into the said demised premises, with the appurtenances, and became, and at the same time when, &c. was and still is thereof possessed. The cognizance then justified the seizing of the sheep doing damage to *locus in quo* ; and another cognizance of the same nature was pleaded as bailiff to *T. H.* under a demise from *M. Pryse*. Pleas in bar, *de injuria*, traversing, that the said place in which, &c. is, and at the said time when, &c. was, and from time whereof the memory of man, &c. hath been part and parcel of the said tenement of land, called or known by the name of *Bwlchystullen*, otherwise *Bwlchystullen Sheep Walk*, otherwise *Libert Bwlchystullen*.

Replications taking issue on the traverses.

On the trial, the testimony of the following witnesses, on behalf of the defendant, was admitted, to wit ; first, of *J. D.* who swore that he knew the tenement called *Bwlchystullen*, and had known it forty-eight years ; that he lived upon it for seven years, as servant to *H. J. G.* ; that the *Sheep Walk*, belonging to that tenement, begins at the north west at *Nautmelin River*, thence eastward to *Rhys, Corse y Carreg*, thence southward to *Craig yr Hellen* and to *Nantilo*, and so on to the *River Rheidol*, then back westward to *Nant yr Helfa-Brook* and to *Bank y Garn*, and then to *Cefn Nant Glass* and *Llyast Nant Glass* ; that *Cefn Nant Glass* and *Llyast Nant Glass* are on the same side the river *Lery* with *Bwlchystullen* ; that the river *Lery* runs round, under *Cefn Nant Glass* and *Llyast Nant Glass*, and so to *Bwlchystullen* lands : that he remembered seeing *H. J. G.*'s sheep (the *Bwlchystullen* sheep) upon *Cefn Nant Glass* and *Llyast Nant Glass* ; that he never saw any strange sheep there ; that there were some remains of a house at *Cefn Nant Glass*, but

he could not certainly say whether of a house or a fold, but there were old gable ends; that they used these old walls as a fold for *H. J. G.*'s sheep, but the building was always a ruin since he knew it; that he described the above as the boundaries of the *Bwlchystullen Sheep Walk*, because the ground within those boundaries was occupied as a sheep walk by the *Bwlchystullen* tenants. Next of *R. Lewis*, who swore that he was born near *Bwlchystullen*, and had known it for fifty-three years; that he knew *Cefn Nant Glass* and *Llyast Nant Glass*, part of *Bwlchystullen*; that *J. G.* was tenant of *Bwlchystullen*, and that his cattle used to graze *Cefn Nant Glass* and *Llyast Nant Glass*; that he never saw any other cattle but those of *J. G.* upon it; that he remembers walls at *Cefn Nant Glass*, which were used for folding sheep or lambs; that there were only walls, and no appearance of the gable ends of an house, or of a garden; that there were other old walls upon this sheep walk, which were used for the purpose of folding, in the same manner as those of *Cefn Nant Glass*; that he remembered three tenants at *Bwlchystullen*, who all folded their sheep at *Cefn Nant Glass* and *Llyast Nant Glass*. Next, of *M. H.* who swore that she was daughter to *H. J. G.*; that she had known *Bwlchystullen* for thirty years or more; that *H. J. G.* held *Bwlchystullen*; that she knows *Cefn Nant Glass* and *Llyast Nant Glass*, and that it is part of *Bwlchystullen*; that *Bwlchystullen* sheep fed upon *Cefn Nant Glass* and *Llyast Nant Glass*; that she has kept lambs there; that she never saw any of Mr. *D.*'s cattle there; that there are old walls there. Lastly, of *E. D.*, who swore that he had known *Bwlchystullen* for thirty years; that *H. J. G.* was tenant of it when he first knew it; that *H. J. G.*'s cattle grazed *Cefn Nant Glass* and *Llyast Nant Glass*; that there is an old wall there, within which he folded sheep in order to mark them; that he never saw any other cattle except those

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of *Bwlchystullen* upon *Cefn Nant Glass* and *Llyast Nant Glass*.

On the part of the plaintiff, his counsel offered to prove in evidence that the said *H. J. G.* and *J. G.* his father, who were successively tenants of *Bwlchystullen* and *Llyast Nant Glass*, of which *Cefn Nant Glass* is a part, both deceased, long before the trial of the said issue, did respectively, while in the occupation of the above-mentioned premises, *declare that they rented Llyast Nant Glass of one Mr. M. E.*, which said *M. E.* was never the owner of *Bwlchystullen*, which has for a long time belonged to the family of *P.*; *that the said H. J. G. declared he paid the said M. E. five shillings yearly, and a quarter of mutton, for the said Llyast Nant Glass; that he declared that he was then going to pay the said rent to the said M. E. for the said Llyast Nant Glass; that he ordered his servant to herd some cattle on Llyast Nant Glass, saying he could not otherwise afford to pay Mr. M. E. his rent; that the said H. J. G. prevented a certain person from cutting rushes on Llyast Nant Glass, and threatened him that he would tell M. E., his landlord, of his cutting the said rushes, and once took the rushes from the said person and told him they belonged to Mr. M. E.; that about forty years ago one T. H. rented Llyast Nant Glass for one year, and declared that he paid rent either to M. E. or his mother.*

The defendant's counsel objected to the admission of this evidence on the part of the plaintiff; the judge refused to admit it, and the jury found a verdict for the defendant, damages 1s. For this the plaintiff put in his bill of exceptions, and brought this writ of error, on the ground that the above evidence, rejected by the judge at the trial, ought to have been admitted.

There does not appear to have been much argument on the case, as the cause was settled between the parties. The court however were of opinion, that as this was a question as to the boundary of lands, whether or not one place was parcel of, another, in which reputation was evidence, the evidence offered to be admitted was admissible, though it was merely hearsay. The cases of *Holloway v. Raikes*, Mich. T. 12 Geo. III, and *Doe ex dem. Forster v. Williams*, Cowper Rep. 621. *Thurston v. Stalford*, Lutw. 905, b. were cited.

The cause was settled between the parties.

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MOFFATT and another, *Executors of POYNTING*,
against VAN MULLINGEN, and others.

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INDEBITATUS *assumpsit* for money paid, laid out, expended, and lent by testator for defendants. There were also counts for money had and received, and on an account stated with testator. Plea in abatement: and that the said several promises and undertakings in the said declaration mentioned (if any such were or was made) were and each and every of them was made by the said defendants, together with one *J. F.*, *J. A.*, *J. P. A.*, and the said *W. M.* the plaintiff, jointly, and not by them the said defendants, separately from and without the said *J. F.*, *J. A.*, *J. P. A.*, and the said *W. M.* the plaintiff, (to wit) at, &c., aforesaid, and that the said *J. F.*, *J. A.*, *J. P. A.*, and the said *W. M.*, the plaintiff, at the time of the exhibiting of the said bill of the said plaintiffs,

A party cannot be both plaintiff and defendant in an action at law; and therefore where plaintiff sued as executor, and defendants pleaded, that the promises in declaration were made jointly with plaintiff, the Court held this a good plea in bar of the action. A plea in abatement in proceedings by bill in the K. B. concluding with prayer, that declaration be quashed, is bad (a).

(a) See 2 Bos. and P. 124, n.; so if the proceedings are by bill, and defendant, in plea in abatement, prays judgment of writ and declaration, it is bad. 1 B. and A. 172. 2 M. and S. 484. But not so, if proceedings are by original. See 2 Saund. 209. Fidd, 6th ed. 675.

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against them, were and still are living and in full life, to wit, at, &c., aforesaid ; and this they the said defendants are ready to verify. Wherefore, inasmuch as the said *J. F., J. A., J. P. A., and W. M.,* are not named in the said declaration, they the said defendants pray judgment, *and that the same declaration may be quashed, &c.*

Demurrer for the causes following, that is to say ; for that the said defendants have pleaded their said plea in abatement of the said declaration of the said plaintiffs, and have concluded their said plea by praying that the said declaration may be quashed. Whereas, according to the established practice and authorities, and the law of the land, the said defendants ought to have pleaded in abatement of the bill of the said plaintiffs, and have concluded their said plea by praying that the said bill of the said plaintiffs may be quashed ; and for that the said plea of the said defendants is in other respects insufficient, uncertain, and wants form.

Joinder in demurrer.

The plaintiffs obtained judgment on this demurrer, but the defendants had liberty to plead afresh ; when they pleaded *non assumpsit*, and a further plea that the said several promises and undertakings in the said declaration mentioned (if any such were or was made) were, and each and every of them was made by them the said defendants, together with the said *W. M.* one of the plaintiffs in this cause, jointly, and not by them the said defendants, separately from and without the said *W. M.,* to wit, at, &c. aforesaid, concluding with a verification and prayer of judgment. To this plea the plaintiffs demurred generally, and defendants joined in demurrer.

Wood, for plaintiff. The objection to this plea is,

that it should have been pleaded in abatement, and not in bar of the action. The want of a proper party to be made a defendant, is only pleadable in abatement (*b*). The plea here is, that the promise was made by the defendants jointly with one of the plaintiffs. The plaintiffs sue as executors, therefore they are trustees for others. The money to be recovered in the action must go as part of the assets of the testator.

SED PER CURIAM. The plea is in effect a plea in bar. In a court of law a man cannot sue himself.

Judgment for defendant.

(*b*) 5 Co. 119, a. 2 Taunt. 254. 1 Saund. 154, n. l. 291, b. n. 4. 5 T. R. 651. 1 East, 20. 4 T. R. 725. 2 Bla. R. 947. 3 Camp. 60.

KESTERTON *against* SABERY *and another*.

SCIRE facias against defendants as administrators of *Isaac Phillips*, on a judgment for 400*l.* against intestate, whereon the sheriff under an execution under the judgment had levied only 207*l.* 7*s.* 6*d.* Plea : and the said defendants say that the said plaintiff ought not to have execution against them for the residue of the debt and damages aforesaid, because they say that after the recovery of the said judgment against the said *I. P.*, in the said writ of *scire facias* mentioned, and after the levying of the said sum of 207*l.* 7*s.* 6*d.* in the said writ of *scire facias*, and in the lifetime of the said *I. P.*, to wit, on, &c., at, &c., by a certain deed poll, sealed with the seal of the said plaintiff, and with the seals of divers other persons, creditors of the said *I. P.*, bearing date, &c. (and by

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A covenant in an indenture (whereby a debtor assigned his effects to trustees for benefit of creditors) not to sue, if trustees fairly accounted for effects, does not operate as a release of the creditor's debts, if trustees refuse to account (*a*).

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the said defendants now brought here into the court of our said lord the king, before the king himself, the date whereof is the same day and year last above mentioned) *reciting*, that the said *I. P.* had agreed to assign over, and had actually assigned over by indenture, bearing equal date with the said deed poll now brought here into court, all his estate and effects then lying at the Custom House, or elsewhere, and all his right, title, and interest to seized goods, prosecutions, and penalties, which might be legally recovered from any person or persons whomsoever, to the said defendants, by the respective names and descriptions of two of his the said *I. P.*'s creditors, in trust for themselves, and the benefit of those creditors only who should forthwith come in and sign the said deed poll, to be divided in equal shares and proportions; and further *reciting*, that the said *I. P.* had stipulated, promised, and agreed upon having a full discharge from his several creditors parties to the said deed poll, to pay 6s. 8d. in the pound upon every seizure that should be made by him in future, and out of all monies that he might receive at the Custom House, or elsewhere, or should possess or be entitled to thereafter on any account whatsoever, till each and every of his creditors should have received full 20s. in the pound who should respectively come in and execute the said deed poll, but not otherwise. It was declared by the said deed poll, that they the said creditors of the said *I. P.*, did for themselves severally and respectively, and for their several and respective executors, administrators, and assigns, covenant, promise, and agree, to and with the said *I. P.*, his executors, administrators, and assigns, to accept, receive, and take their and each of their share and dividend of the estate and effects of the said *I. P.*, at the Custom House or elsewhere, arising from the several seizures made by him, or otherwise, any money that might be

coming on that or any other account to his estate ; and the said several creditors did severally and respectively covenant, promise, and agree, to and with the said *I. P.*, his executors, administrators, and assigns, that they the said defendants, or the survivor of them, should have full liberty to sell and dispose of the goods, chattels, wares, and merchandizes, at the Custom House or elsewhere, or should sue for all rights, interests, or claims of the said *I. P.*, as they might judge necessary, or compound for the same, and the money that should arise therefrom, after deducting all costs and expences on account of the same, should, when the same should amount to five shillings in the pound, within the space of twenty days, be divided rateably and proportionably amongst all the creditors of the said *I. P.*, who should respectively have executed the said deed poll ; and any two or more of his creditors, upon giving three days notice, should have full liberty to inspect the books or accounts of the said defendants, containing the trust accounts ; and the said plaintiff, and the said several other creditors, by the said deed poll, did covenant, promise, and agree, to and with the said *I. P.*, his executors, administrators, and assigns, that they would not at any time or times thereafter sue, arrest, molest, trouble, imprison, attach, or condemn the said *I. P.*, or his goods or chattels, for any debt or other thing then due or owing to them or any of them, *provided the estate and effects of the said I. P., should be fairly accounted for by the said defendants, and a dividend made amongst them the said several creditors of the said I. P., parties to the said deed poll,* as by the said deed poll, reference, &c. ; and the said defendants further say, that after the making of the said deed poll, they the said defendants did take upon themselves the said trust mentioned in the said deed poll, and did receive a large sum of money, to wit,

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the sum of 116*l.* 2*s.*, under and by virtue of the said trust ; and the said defendants further say, that they the said defendants always have been and are ready and willing to account for the same, and to pay the same according to the form and effect of the said deed poll, to wit, at, &c., aforesaid, and this, &c. ; wherefore they pray judgment whether the said *J. K.* ought to have execution for the residue of the debt and damages aforesaid, against them, &c.

Replication. And the said plaintiff says, that by reason of any thing in the said plea above alledged, *he ought not to be barred from having execution against the said defendants for the residue of the debt and damages aforesaid*, because he says that the estate and effects of the said *I. P.* have not been fairly accounted for by the said defendants, and a dividend made amongst the said several creditors of the said *I. P.*, parties to the said deed poll, according to the form and effect of the said deed poll, and of the said proviso therein in that behalf contained, but on the contrary thereof the said plaintiff says that after the sealing of the said deed poll by the said plaintiff, and after the death of the said *I. P.*, and before the suing out of the said writ of *seire facias*, to wit, on &c., aforesaid, &c., a certain large sum of money, to wit, the sum of 500*l.* of the estate and effects of the said *I. P.* was in the hands of the said defendants, and that he the said plaintiff then and there requested the said defendants to account for the same, and to make a dividend thereof amongst the said several creditors of the said *I. P.*, parties to the said deed poll, according to the form and effect of the said proviso in the said deed poll in that behalf contained ; but that the said defendants then and there refused so to do, and the same remains hitherto in the hands of the said defendants, wholly unaccounted for and

undivided amongst the creditors aforesaid, contrary to the form and effect of the said deed poll, and of the said proviso in that behalf made; and this, &c., wherefore he prays judgment, and that he may have execution for the residue of his debt and damages aforesaid, to be levied of the goods and chattels which belonged to the said *I. P.* at the time of his death, and which are in the hands of the said defendants, to be administered, &c.

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Demurrer. For that it doth not appear, nor is it alledged in and by the said replication, that the said defendants have received any sum of money for or on account of the said trust in the said deed mentioned, whereby a dividend of five shillings in the pound could be paid to the creditors of the said *I. P.*, who have executed the said deed; and for that the said plaintiff hath not shewn where or when the said defendants refused to make any dividend of, or to pay the money so received by them as aforesaid; nor hath the said plaintiff laid any venue where the said defendants received the said money so alledged in and by the said replication to be received by them as aforesaid, nor is it thereby shewn or alledged for whom or on what account the same is supposed to be received by them, as aforesaid; and for that the said replication is in various other respects informal, defective, and insufficient.

Joinder in demurrer.

Baldwin, for defendants. This *scire facias* will not lie against the defendants in the character of administrators. The intestate did every thing he could for the benefit of his creditors, and he was to have his discharge on making an assignment of his property. The intestate by this deed was discharged from his

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debts, and it would be hard, if for the misconduct of trustees he should be liable. The deed operated as a release. 1 *Lord Ray.* 520. 1 *Roll.* 939. 11 *Vin.* 461. *Dyer*, 140. Besides this, the defendants were to make a dividend only when they should receive enough to divide five shillings in the pound. The plaintiff does not in his replication aver that they received enough for that purpose, but merely that they received a certain sum. The other objections, as stated in the demurrer, are not perhaps tenable.

Russell, for plaintiff. The deed in this case did not operate as an absolute release of the plaintiff's claim, but it was merely a covenant on his part not to sue, provided the effects were fairly accounted for by the defendants. The defendants have refused to account, and the covenant is discharged, and the defendants are liable as administrators. He cited *Aloff v. Scrinshaw*, 2 *Salk.* 573. *Raym.* 187, 393, 413. *S. C.* 1 *Show.* 46, 47. *Comb.* 123. *Carth.* 63. *Holt*, 619. As to the other point, it would be intended from the averment that the defendants received 500l.; that it was sufficient to satisfy five-shillings in the pound; and if it was not, defendants should have so rejoined.

The court were of opinion in favour of the plaintiff, but gave the defendant liberty to withdraw demurrer and rejoin.

HARRISON *against* JAMES.

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THE following was a special case for the opinion of the court, viz. This was an action for money had and received. The defendant pleaded the gene-

An act of parliament, exempting carts, &c. loaded with manure, from toll, exempts them from toll if they are going empty to fetch manure (a).

(a) This question will not, in all probability, again occur, as by the 52 Geo. 3, c. 145, sec. 1, it is enacted, "That from and after the 29th day of September, in the year of our Lord 1812, in every case in which under any act of parliament for making, widening and enlarging, repairing, or otherwise relating to any turnpike road, there is an exemption from toll or duty in respect of any horse, mule, ass, oxen, waggon, cart, or other carriage, carrying or drawing any dung, mould, soil, marl, lime, or compost of any nature or kind soever, for manuring or improving the land, or hay, straw, or any other fodder for cattle, such exemption shall be deemed to extend in respect of every such waggon, cart, or other carriage, and also in respect to the cattle drawing the same, going empty, or loaded only with implements necessary for more convenient carriage, or loading or unloading such lading, or returning empty, or with such implements as aforesaid, having been so laden, notwithstanding the said waggon, cart, or other carriage shall, for the purposes aforesaid, go to or return from any parish or place in which the said turnpike road does not lie." And by the second section it is provided and enacted, "That for the preventing of frauds on toll collectors, by carts or waggons passing empty, or loaded only with implements necessary for the more convenient carriage of, or for loading or unloading manure through turnpike gates, under pretence of going for such manure, the owner or driver of every empty waggon, cart, or carriage claiming the exemptions hereby extended, any or either of them, shall in all cases pay the toll in respect of such waggon, cart, or carriage, before the same shall be permitted to pass through such turnpike gate; and that the collector of such toll shall thereupon deliver to such owner or driver a ticket, to be marked 'manure exemption,' with the name of the gate, and the date when delivered, and the amount of the toll so paid, all which sums and sums so paid, shall be repaid to the owner or driver of such waggon, cart, or other carriage, upon his or their returning on the same day (this part, as to returning on the same day, is repealed by 53 Geo. 3, c. 82, sec. 3;) with such waggon, cart, or other carriage, so laden as aforesaid, and producing such ticket; and every collector of such toll refusing or neglecting to return the same upon the return of such waggon, cart, or other carriage, and production of such ticket as aforesaid, shall, for every such offence, forfeit and pay to the owner of such waggon, cart, or other carriage, a penalty not less than ten shillings, or more than forty shillings, upon conviction thereof before one or more justice or justices of the peace for the county or shire

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ral issue. This cause came on to be tried before Mr. Justice Gould, &c. when the jury found a verdict for the plaintiff for the sum of 2*l.* 11*s.* 8*d.* subject to the opinion of the court on the following case: that the defendant *Wm. James* is lessee of the tolls of the *Surrey* and *Sussex* turnpikes, imposed by the act of 25 *Geo.* III. That the sums for which the action was brought, were sums of money which had been demanded by the collector of the said tolls, who was the servant of the defendant, and paid by the plaintiff, for going through the said turnpike with an empty waggon for the purpose of fetching grains and dung for the manuring lands in the parish of *Battersea*, through which parish the roads mentioned in the said statute run; that the said waggons did accordingly respectively return, laden with grains and dung for that purpose; that the plaintiff, upon such his return with the said waggons, did at the several and respective times of such his return, demand of the collector of the said tolls the money that he had previously paid for the passing of the said waggon whilst it was empty, and that the said

“ or place where such offence shall be committed, upon the oath of one or more credible witness or witnesses (which oath the said justice or justices is and are hereby empowered to administer); and if the same shall not be paid upon such conviction, to commit the person or persons so offending to the common gaol or house of correction for the said county, shire, or place, for any time not exceeding one month.”

By the 53 *Geo.* 3, c. 82, sect. 2, it is enacted, “ That from and after the passing of this act, the owner or driver of any waggon, cart, or other carriage, laden with manure for land, passing through any turnpike gate, or otherwise passing on or across any turnpike road, shall not be liable to pay any toll, nor shall any toll be demanded for such carriage so laden, or the cattle drawing the same, by reason only of any empty basket or baskets, empty sack or sacks for more convenient carriage, or spade, shovel, or fork, necessary for loading or unloading such manure, being in or upon any such waggon, cart, or other carriage, in addition to such manure, if the loading thereof is substantially manure for land as aforesaid, any thing in any act contained to the contrary thereof notwithstanding.”

collector refused to repay the same. The question for the opinion of the court is, whether the plaintiff is intitled to recover.

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Shepherd, for plaintiff. The clause in the statute exempts carts carrying manure from the payment of toll. If the plaintiff was not exempt from the payment of toll in this case, the clause in the act of parliament would be nugatory. A waggon going empty to fetch dung is virtually exempt, because it must go empty to fetch it. Every person has liberty to go through twice in the day for one toll. If a party goes with a load to town, I admit he must pay toll; but where he goes empty, and his sole purpose of going is for dung, he ought to be exempt. If a cart goes empty for gravel, he ought to have a return of the toll on his return with the gravel. There is an exemption in the act for horses going to be shod: in that case, with analogy to this, the defendant would urge he must pay for the horse when he comes back shod. There is a penalty of 40s. for any man claiming these exemptions, who is not entitled.

Bond, Serjeant, for defendant. We must take it on the words of the exemption. There is a general burthen upon all persons passing. The words of the statute are, that carts carrying manure, &c. shall be exempt: the act does not exempt empty carts. The exemption can go no further than the express letter, and it cannot be extended by equity.

SED PER CURIAM. The intention of the act was, that no new burthen should be laid upon agriculture; and the statute would be nugatory if we were not to put the construction on the act which is contended for by the plaintiff.

Judgment for the plaintiff.

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HESLOP against JONES.*Mich. T.*

Where plaintiff, by a charterparty, dated 1st March, let to defendant a ship to freight, and by the terms of the charterparty the plaintiff was to carry an outbound cargo of goods (not prohibited by restraint of prices) from Liverpool to Carolina in America, and to bring back from thence a cargo of rice for defendant, defendant paying freight for the same; and plaintiff cleared out on the 22d of March from Liverpool, with a cargo of salt, and on the 22d May following arrived at Carolina, where the importation of British goods was prohibited by an order issued the 1st of March, the very day the charterparty was dated; and also a further order, prohibiting the exportation of goods to England, so that the plaintiff could not unload the salt, or bring back a cargo of rice. Held, that the plaintiff could not recover for freight homewards, if it could be established in evidence, that he knew of the prohibition at the time of the ship's clearance from Liverpool. The fact of the plaintiff having such knowledge, must necessarily depend upon the circumstances of the case. *Quære*, What will amount to a sufficient abandonment of a voyage between parties to a charterparty?

BEARCROFT, on a former day, had obtained a rule to shew cause why there should not be a new trial on this case, on the ground that the verdict was found contrary to law and evidence. The action was brought on a charter party, under seal, dated the 1st March, 1775, whereby the plaintiff let the ship *Hannah* to freight, to the defendant and others. By the terms of the charterparty, the plaintiff was to carry a cargo from *Liverpool* to *Charles Town*, in *South Carolina*, in *America*, and bring back another cargo of rice, for defendant and others, to *Liverpool*, the plaintiff reserving to himself a liberty of taking out a cargo of any *British* goods (except those restrained by restraint of Princes). The plaintiff shipped on board a quantity of salt. The vessel was cleared at *Liverpool* on the 22d March following, and set sail on the voyage on the 30th. The vessel arrived at *Charles Town* on the 19th May following; but in consequence of the plaintiff having imported a part of the cargo of salt, after an order for the non-importation of *British* goods in *Carolina*, issued the 1st March, 1775, he was ordered to sea from the port of *Charles Town*; and although the plaintiff did every thing in his power to obtain a cargo of rice shipped for defendant, yet he could not. Besides this, there was a general prohibition made on the 26th May, 1775, by the committee at *Charles Town*, prohibiting the exportation of rice to such as had not commenced loading before the 24th May. The plaintiff however did obtain a small loading of timber. The plaintiff, by his declaration, sought to recover from the defendant the difference of

the freight, *minus* the freight for the timber from *Charles Town* to *Liverpool*, averring in his declaration, that he was always willing to bring back a cargo, but was prevented by the restraint of princes. The defendant pleaded, that the plaintiff knew that salt was a prohibited commodity for importation at *Charles Town*, and ought not to have shipped the salt, and that therefore the restraint of princes was incurred by his own default. The defendant also pleaded that the voyage was abandoned by the consent of plaintiff and defendant. Issues were taken on these pleas. On the trial of the cause, the jury, by the direction of the judge, found verdict for the plaintiff on the issues, damages 230*l*.

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On the trial, all the evidence adduced was on admissions; and amongst other admissions were the following, viz.

A copy of Protest.—“ *South Carolina*.—On the 25th day of *May*, 1775, before me, *Fenwick Bull*, one of his majesty’s justices of the peace of *Charles Town* district, and a notary public, by lawful authority appointed, duly admitted and sworn, dwelling and practising in *Charles Town* and province aforesaid, in *North America*, personally appeared *George Heslop*, master of the brigantine *Hannah*, lately arrived here from *Liverpool*, in *Old England*, and now riding at anchor within the bar and harbour of *Charles Town*, and requested of me, notary, to protest, as by these presents I do protest, against the shippers of salt, consigned to Messrs. *Powell, Hopton, and Co.* merchants, of *Charles Town*, for all losses, costs, charges, and damages that may arise to the said brigantine *Hannah*, or the owners thereof, in consequence of having the said salt on board, which upon the vessel *Hannah’s* arrival, the inhabitants of the said pro-

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“ vince of *South Carolina*, under the special guidance
 “ and direction of their committee, would not suffer
 “ to be landed, upon any account or pretence whatso-
 “ ever, whereby the said vessel *Hannah* was and is im-
 “ peded and hindered taking in rice from the house of
 “ Messrs. *Rowland* and *Henry Rugeley*, upon charter-
 “ party, the said vessel having been chartered for the
 “ purpose of fetching away, and carrying to Europe,
 “ her load of rice from the said *Rugeley's*, on account
 “ and risk of Messrs. *Henry Jones*, *Rich. Prime*, *Rich.*
 “ *Harris*, and *Wm. Dickinson* : And I, the said notary,
 “ do further certify, that at the request of the said
 “ master, *G. Heslop*, I did accompany him the day
 “ above mentioned to the house of Messrs. *Rowland*
 “ *Rugeley*, and *Henry Rugeley*, merchants, in this
 “ town, and there meeting with Mr. *Rowland Rugeley*,
 “ I demanded of him the rice so intended to be put on
 “ board ; to which he replied, that as soon as the cap-
 “ tain should inform him that he was ready to take in
 “ rice, he should put on board two hundred barrels,
 “ which were provided ; that he had some ready money
 “ by him, and would purchase more rice, if to be had,
 “ and would do every thing in his power to procure
 “ and obtain a full freight for the brigantine *Hannah*,
 “ but as the unhappy state of *America* was truly se-
 “ rious and alarming, he could do no more ; therefore
 “ I, the said notary, do hereby protest as aforesaid
 “ and before mentioned, and particularly against any
 “ of the said losses, costs, charges, and damages, fall-
 “ ing upon the said master, the same not happening
 “ through any default of or in him, or any of his peo-
 “ ple. Witness my notarial firm and seal, the day and
 “ year above written.

“ GEORGE HESLOP.”

*A copy of a Letter, dated Liverpool, 4th March, 1775,
 from Mr. Heslop to Mr. Prime.—“ Inclosed I send*

“ you the charterparty of affreightment, signed and
 “ witnessed accustomary, and hope to be favoured
 “ with the counterpart from you soon, with your let-
 “ ters and instructions, advising me to whom I am to
 “ address myself on my arrival at *Charles Town*: I
 “ shall, without fail, be ready to sail by this day week.
 “ What instructions you, and the gentlemen con-
 “ cerned, please to give, shall be duly observed; and
 “ you may depend of the utmost exertion of my abili-
 “ ties for the good of the concern. I remain, sir, your
 “ obedient humble servant,

“ GEORGE HESLOP.”

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A copy of a Letter, dated Charles Town, the 27th of May, 1775. “ Mr. Richard Prime. — Sir, I arrived here the 19th inst. and addressed myself to Messrs. Rowland and Henry Rugeley, who I found very poorly prepared; very lucky for the concerned, I am ordered to sea from this port, for importing about half a cargo of salt, which I offered to throw overboard, give it to the poor of Boston, or whatever they pleased. Yesterday the committee prohibited the shipping of any more rice, so that I am about to leave this place to day; considering our contract dissolved by restraint of rulers, I intend to go to Quebec to seek freight; Messrs. Rugeley are extremely glad on this occasion, yet if this prohibition be taken off he can have no excuse for keeping the effects, for there is enough here, even cheaper than I was chartered. I hope the next time we have dealings things will go smoother. My compliments wait on Mr. Prime. Your’s

“ GEORGE HESLOP.”

A copy of a Letter, dated Liverpool, the 29th of March, 1775, from Richard Kent, Esq. to Messrs. Powell, Hopton, and Co.—“ Gentlemen, I had the honour of writing you last the 29th of December, and have not since been favoured with any of yours.

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" I cannot but suppose but the restrictual measures
 " fixed on your side the water, must long before
 " this be given up, particularly in the common neces-
 " saries of life, for people cannot certainly be so blind
 " to their own good to persevere in doing what must
 " so much injure both the subjects of *Great Britain*
 " and her colonies; from this opinion I have again
 " troubled you with addressing to you 219½ tons
 " white salt, per the *Hannah*, Captain *George Hes-*
 " *lop*, as per the inclosed bill of lading and invoice,
 " amounting to 295*l.* 4*s.* 3*d.*, at a ready money price.
 " You will see the freight is 10*s.* per ton, but no port
 " charges. I hope the vessel will arrive safe, and you
 " will be able, without any difficulty, to land and dis-
 " pose of the cargo to advantage; and you may, when
 " in cash, remit me *London* bills of the amount of
 " this, as also the former parcel by the *Industry*, on
 " account of Mr. *Rathbone* and myself; or if I find
 " any encouragement by such letters as you may have
 " wrote me, I will send one of my own vessels out
 " and load her with salt, and take produce back.
 " If there should, contrary to my expectations, be any
 " difficulty in landing this cargo, you will take every
 " prudent method for my interest; and if any risk at-
 " tends it, the captain risks his freight by agreement,
 " and I am to take only the chance of the salt.
 " I hope soon to have an agreeable account from you,
 " and am with esteem, gentlemen, Your's, &c.

" RICHARD KENT."

A copy of a Letter, dated Liverpool, the 29th of March, 1775, from Richard Kent, Esq. to Captain George Heslop.—" Having shipped 219½ tons of white
 " salt on board your ship, *Hannah*, and addressed it
 " to my friends, Messrs. *Powell, Hopton*, and Co.,
 " of *Charles Town*, you will, on arrival, deliver it to
 " them; but if you should meet any insurmountable
 " difficulties you will consult them, and I hope they

" will find some expedient to discharge it; if it is
 " totally impossible, and that neither them nor you
 " can see any mode of getting it clear but by destroy-
 " ing the salt, you must then lose your freight of
 " ten shillings per ton, and I must suffer the loss,
 " which I hope will not be the case. I am, wishing
 " you health and a good voyage, Sir, yours, &c.

" RICHARD KENT."

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Counsel now shewed cause against the rule. These transactions took place in 1775, when the tumults were in their height in the northern provinces of *America*, but the southern were more quiet. *South Carolina* is one of the southern provinces. The prohibition to import *British* goods in the northern provinces took place some time before the entering into the charterparty, viz. in *December*, 1774; but in *South Carolina* it did not take place till the 1st of *March*, 1775, the very day when the charterparty was dated. The prohibition extended to all *British* commodities, and therefore the importation of salt was not in a greater degree prohibited than other goods. The plaintiff reserved a liberty of taking a cargo, that he might not go empty, and he was at liberty to take any *British* goods that were, not at the time of the date of the charterparty, then prohibited. He would not, I admit, be entitled to freight, if at the time of the clearance of the ship he knew that the salt was a prohibited article; but he was not then aware of it. No notice was given to him, neither could it have been given. A mere rumour of a prohibition would not be sufficient. Rumours are frequently fabrications; too frequently incorrect: no prudent man should ever rely on them. The defendants should have proved the plaintiff had actual knowledge of an actual prohibition. The knowledge of the prohibition was not brought home to the plaintiff from any circumstances. It did not appear that any person

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at *Liverpool* knew of it, or that it was authentically stated in any newspapers. It hardly could have been known, for the prohibition took place on the 1st of *March*, and the ship cleared on the 22nd, and sailed on the 30th of *March*. The news of the prohibition could not have arrived in this time. No ship ever came over from *South Carolina* in twenty-two days. If he had notice at all to bar him of freight, he should have had it before he cleared the vessel. If there was great probability of the knowledge, I admit there might be ground for a new trial; but that is not the case. Though there might have been some reason for the plaintiff to apprehend there was a prohibition, that was not sufficient. If he had thought the salt would have been useless, he would hardly have been so foolish as to carry it. The chief evidence which was relied on, as proving that the owners had knowledge of the prohibition, was the letter written by *Kent*, dated the 29th of *March*: but surely his observations in that letter are formed on mere surmises and suppositions; it does not shew any knowledge of that fact. The liberty to carry goods would have been nugatory, if the plaintiff could not carry salt, because salt alone was not particularly prohibited, but all *British* goods.

The plaintiff was prohibited to load a cargo of rice, not on account of having salt on board, but because there was a *general prohibition to export to England*. Even if he had come with an empty ship, he could not have brought back a cargo of rice. The plaintiff's liberty to take goods to *Carolina* was for the defendant's benefit, as it enabled the plaintiff to bring home defendant's goods at a less freight than if the plaintiff had gone empty. The defendant was equally bound to take notice of the prohibition, and should not have given a general liberty to the plaintiff, to load a cargo of *British* goods.

With respect to the question and issue, whether the voyage was abandoned by the consent of both parties, nothing was shewn in evidence to prove such abandonment. The letter chiefly relied on to prove that the plaintiff had abandoned, was the one dated the 27th *May*; but this letter was not under seal, and was therefore no release or cancellation of the charterparty, which was under seal. But putting this out of the question, and looking to the mere fact, I contend that this letter did not abandon the plaintiff's right to freight. The plaintiff only states therein, that he was prevented from *lading* a cargo of rice by the restraint of princes; the contract therefore would only thereby be dissolved as *to the taking in a loading*, but not as to the *freight*. At all events, it was a mistake of the law only, and not a voluntary relinquishment.

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Bearcroft, in support of the rule. The only question in this case is, whether the issues were properly discussed at the trial, and whether a proper verdict was found, according to the evidence. I contend that such was not the case. On the face of the declaration the plaintiff has stated, what we insist on; namely, that he was at liberty to take an outward cargo; that he did do so, and arrived at the place of destination; that he was ready to receive a lading for defendant, but that he was hindered by the then rulers of *Charles Town*, from unloading the salt, or receiving a loading for the defendant. He then says, he was obliged to sail, and return without a cargo. By the evidence adduced, it was clear that before the plaintiff cleared from *Liverpool*, the prohibition as to the importation of salt was known to him. The letter written by *Kent* on the 29th *March*, shews that it was considered as a smuggling transaction. The protest was against the shippers of the salt, as having lost the homeward voyage; and it was through their default.

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Baldwin, on the same side. The plaintiff should not recover any thing. The plaintiff was certainly at liberty to take an outward bound cargo; but he should have so acted as not to lose the defendant the benefit of a return cargo. The plaintiff was never in a situation to receive a return cargo, as he had never unloaded his salt. The plaintiff was not to have freight for the salt, if he was not permitted to unload. He considered the contract as at an end, because he could not load (a).

(a) It does not appear from Mr. Justice *Ashurst's* paper books how this motion was determined; but it should seem that the rule was discharged. The arguments of the counsel may be found useful.

1788.

Trinity Term.

A will, directing testator's debts to be paid, and devising several estates to his wife for life, and after her decease, devising his property in the following words, viz. "I give Mr. W. the income of my four shares in the Corn Market for his life, and all the rest of my estates, with all monies in the stocks in Mr. M.'s hands, or any other securities, to be divided in equal shares, to E. S. and others," passes a reversionary interest in the said four shares in the Corn Market to E. S. and others.

FLETCHER against SMITON.

THE following was a case for the opinion of the Court, viz.—This was an action for money had and received by the defendant to and for the use of the plaintiff. The cause came on to be tried at the Sittings after *Easter Term*, 1788, at Guildhall, London, before the Hon. Mr. Justice *Buller*, when the jury found a verdict for the plaintiff, damages 14*l.*, and costs 40*s.* subject to the opinion of the court on the following case: that *Matthew Woodward*, being seised in fee of four undivided eightieth parts or shares of the buildings and premises called the *Corn Market*, in the city of London, and of divers other freehold and personal estates, made his will, dated 29th March, 1766, duly executed in the presence of three witnesses, in the following words:—"I, *Matthew Woodward*, of Broad-street Buildings, London, do make my last will and testament as followeth; first, all my debts to be paid, and then I give to *Mary Woodward*, my wife, all my household goods, plate, linen, and jewels, at my houses at *Romford* and *London*, with 500*l.* to her own disposal, as she shall think fit; I give an annuity, to be paid to *Mary Woodward*, my wife, of 100*l.* every year, by *Wm. Morley*, out of the profit-

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“ of the corn trade, as by our articles specified, and
 “ 1000/. to be left in the trade, during her life, for his
 “ use and purpose ; and also I give to the said *Mary*
 “ *Woodward* the profit of my four shares in the Corn
 “ Market, during her life ; also the income and profits
 “ of my estates as follows, during her life ; my lands,
 “ lying in *Byall Fenn*, in the isle of *Ely*, and county
 “ of *Cambridge* ; and my estate in *Hale Ferm Common*
 “ and *Sedge Ferm Common*, in *Willney*, in the county
 “ *Norfolk*, and my adventurers land in the parish of
 “ *Downham* ; and also my estate in the parish of *Weston*,
 “ in the county of *Huntingdon* ; and also my estate
 “ in the Rectory *Manned of Somersham*, in the
 “ county of *Huntingdon* ; and also my estate in the
 “ county of *Warwick*, and town of *Warwick* ; and my
 “ part of a house in *Cornhill*, as by account with *John*
 “ *Ward* ; as also the residue of my personal estate, to
 “ be laid out in Bank Annuities, and *Mary Woodward*,
 “ my wife, to have the income during her life only, of
 “ this and the estates before mentioned, and after her
 “ decease as follows : *I give to M. Weatherley, my ne-*
 “ *phew, the income of my four shares in the Corn Market,*
 “ *for his natural life, and all the rest of my estates, with*
 “ *all monies in stocks and in W. Morley's hands, or any*
 “ *other securities, to be divided in equal shares, to E. Snow,*
 “ *E. Mailard, J. Weatherley, J. Weatherley, and W. Weatherley,*
 “ *share and share alike ; and out of my wife's in-*
 “ *come she to pay to A. Audain 30l. yearly, during her life ;*
 “ and of this, my last will and testament, I leave my
 “ wife, *Mary Woodward*, executrix. In witness, &c.”
 that the testator afterwards died without issue, leaving
 his widow, *Mary Woodward*, and *Matthew Weatherly*,
 and *Ann Audain* (the sister of the testator) his co-
 heirs, alive at the time of his death ; that the widow,
Mary Woodward, died, and *Matthew Weatherly*, after
 the death of the widow, became seised of and enjoyed
 the said four shares during his life, until the 5th of
 October, 1787, on which day he died, having first

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made his last will and testament in writing, duly executed, by which he gave to *Wm. Loveday* the sum of 10*l.*, and all the rest of his estates, real and personal, he bequeathed to *Wm. Fletcher*, the plaintiff, and *Mary* his wife, for their natural lives, and the life of the survivor of them ; that the defendant is treasurer and paymaster to the proprietors of the Corn Market ; that he has received half a year's dividend on the said four shares, and has the same still in his hands ; that this action was brought by consent of all parties, to try whether the reversionary interest in the said four shares passed under the devise to *Eliz. Snow*, *Eliz. Mailard*, *Judith Weatherly*, *Jos. Weatherly*, and *Wm. Weatherly*. The question for the opinion of the court is, whether the reversionary interest in the said four shares passed under the devise to *Eliz. Snow*, *Eliz. Mailard*, *Judith Weatherly*, *Jos. Weatherly*, and *Wm. Weatherly*. If the court shall be of opinion that the reversionary interest did not pass, the verdict to stand ; but if the court shall be of opinion that the reversionary interest did pass, then a verdict to be entered for the defendant.

Shepherd, for the plaintiff. The question in this case is, whether the testator, by this residuary clause in his will, conveyed the reversionary estate in the Corn Market to *Eliz. Snow* and others therein named. I contend that the reversionary estate did not pass thereby. I admit, that if the words of the will had been a devise of "*all the rest of my estate*," that would have conveyed a fee in the estates in general, because this is a technical term. But in this case there is a material difference between the word "*estate*" and "*estates*." Here the testator uses the word "*estates*." The testator, by the preceding part of his will, shews that he did not intend the reversionary estate to pass ; he uses the word "*estate*" before as the specific thing, and not the interest in the devise to his wife,

he cited *Cro. Car.* 447; 1 *Vez.* 226, and *Throgmorton v. Wright*, 3 *Wils.* 414.

SED PER CURIAM. The residuary clause in the will conveys a reversionary estate in *Eliz. Snow*, and the others therein named. The cases cited are not in point. The one in *Vezey* turned upon a distinction between the words, an estate in such a place, and an estate generally. In *Tilley v. Simson*, *East. T.* 1746, and in *Cro. Car.* 447, the word estate there stood coupled with several chattel interests. The testator here directs all his debts to be paid, which could not be done unless all his estates were liable.

Verdict for defendant.

HARTLEY against DIXON.

THE plaintiff brought an action of *assumpsit*, for goods sold and delivered to defendant, and also for monies lent, &c. The defendant first of all pleaded the general issue; and after issue was joined, he pleaded as follows:—And now at this day, that is to say, *Saturday*, the 5th day of *July*, comes the said defendant by his counsel, and says, that the said plaintiff ought not further to maintain this action against him the said defendant, because he says, that after *Wednesday* next after three weeks of the *Holy Trinity* last past, from which day, until *Thursday* next after the morrow of *All Souls* next, unless the justices of our lord the king, assigned to hold the assizes in and for the county of *York*, should first come on the fifth day of *July*, at the Castle of *York*, in the said county of *York*, the action aforesaid is continued, to wit, on the 24th day of *June* last, the said plaintiff then using and exercising the trade or business of a dealer and chapman, became bankrupt, and a commission of bankrupt under the great seal of *Great Britain*, issued out against him,

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1788.

Trinity Term.
Qu. If a plea of plaintiff's bankruptcy since last continuance, is a dilatory plea, or a plea in bar.
Qu. If such plea should not set out proceedings in the bankruptcy specially, and that the plaintiff was a trader (a).

(a) See 9 *East*, 82. 6 *East*, 413. 4 *East*, 502. 3 *Taunt.* 237. 7 *East*, 53. 15 *East*, 622. *Holt*, C. N. P. 172. 4 *Taunt.* 754.

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and the said plaintiff was thereupon found and declared bankrupt, under some or one of the statutes made concerning bankrupts; and afterwards, to wit, on the 28th *June* last, being the day appointed for choosing assignees of the estates and effects of the said plaintiff, under the said commission, *W. S.* and *J. H.* were duly chosen assignees of the estate and effects of the said plaintiff; and an assignment of the estate and effects of the said plaintiff was afterwards, on the said 28th day of *June*, duly made and executed by the major part of the commissioners in the said commission named and authorized, unto the said *W. S.* and *J. H.*, according to the direction of the said statutes made concerning bankrupts, some or one of them; and this the said defendant is ready to verify; wherefore, &c. prays judgment, if the said plaintiff ought further to maintain this action against him, &c. To this plea the plaintiff demurred generally, and defendant joined in demurrer.

Wood, for plaintiff. This plea is bad. The causes of demurrer are not stated, as this being a plea *puis d'arien continuance*, and a dilatory plea, they need not be stated. 2 *Ld. Raym.* 1015. 1 *Ld. Raym.* 337. The objections are, that no *venue* is laid; that there appears to be no date to the commission; nor on whose petition the commission was granted, nor what authority was given to the commissioners; nor that the assignment to the assignees was under seal: a plea *puis d'arien continuance* must have a *venue*. *Freem.* 112. The plea is also bad in substance; for it don't say that plaintiff was a trader, and got his living by buying and selling; but it only states that he was dealer and chapman, which are words not mentioned in the statutes concerning bankrupts.

Chambre, contra. A plea *puis d'arien continuance*, is a plea in bar. Defendant was a stranger, and not privy to the proceedings in the bankruptcy; how could he state them?

The Court were inclined against the plea; but the defendant had leave to amend.

REX against MORGAN.

1788.

Easter Term.

THE defendant was convicted on the 5 *Ann.* c. 14, under a conviction, which stated the information to have been, that the defendant “did kill a hare and destroy the game;” and the evidence to have been, that the defendant “did, with certain dogs, called hounds and greyhounds, kill and destroy one hare.”

A conviction under the 5 *Ann.* c. 14, stating in information, that the defendant “killed a hare,” is bad.

Plomer moved to quash the conviction, on the ground that the offence, as stated in the conviction, was no offence against the 5 *Ann.* c. 14. The evidence of itself certainly brought the offence within the meaning of the statute; but the evidence cannot extend the offence further than that stated in the information. The fact charged in the information is, that the “defendant killed a hare and destroyed the game.” Now the words of the 5 *Ann.* c. 14, are prohibitory against *keeping or using a gun*, &c. to kill, and not against *kill- ing*. The defendant, for all that appears in the information, might have accidentally killed the hare. Kill- ing in the night, or in the snow, is an offence against the statute; but then the offence must be so charged.

The conviction was admitted to be bad by the other side, and the court ordered the same to be quashed.

Conviction quashed.

1789.

DANIEL *against* SAUNDERS.*Easter Term.*

In an action against a trustee under a composition deed (between the defendant A. B. and his creditors) for the amount of plaintiff's (a creditor's) dividends (the deed reciting that the debtor was indebted to the several creditors whose debts were set opposite their names in the schedule annexed to the deed, and the deed covenanting to pay a specific ratio of the debts), it is no defence to say, that the plaintiff did not set the amount of his debt opposite to his name in the schedule. It is sufficient to render the defendant liable, that he had notice of the amount of plaintiff's claim before action a^g.

DECLARATION in covenant on an indenture or composition deed of three parts, dated the 23d of June, 1786, between *W. Ward* of the first part, the said defendant, a creditor of *Ward's*, of the second part: and all other the joint and separate creditors of the said *W. W.*, who by themselves, their respective partners, or other person or persons on their behalf, and by them or any of them respectively lawfully authorized, should seal and deliver the said indenture, of the third part; one part of which said indenture, sealed with the seal of the said defendant and *W. W.*, he the said plaintiff now brings here into court, the date whereof, &c.: reciting that the said *W. W.* was possessed of and intitled unto divers household goods and furniture, stock in trade, debts, and effects: and also of a messuage or tenement, with the shop and appurtenances thereunto belonging, and other messuages, and in the said indenture described; and also further reciting that the said *W. W.* was indebted to his said several creditors in the several and respective sums of money mentioned and set opposite to their several names in the schedule to the said indenture under-written, which he was unable to pay and satisfy; and also further reciting, that at a meeting of the said creditors therein mentioned, the said defendant proposed and agreed to secure and pay to the said several creditors of the said *W. W.* a composition or sum of 7s. 6d. in the pound on their several and respective debts, in full discharge and satisfaction thereof, at three equal payments of 2s. 6d. in the pound, as in the indenture mentioned, [stating them,] which proposal and composition they the said several creditors

(a) See *Harry v. Wall*, widow, 1 Barn. and Ald. 103. 2 Stark. 195.

present at such meeting agreed to accept; and thereupon, and in order to indemnify the said defendant against the payment of the said composition, or sum of 7s. 6d. in the pound, in manner aforesaid, it was agreed that the said *W. W.* should and would assign and make over all his said estate and effects unto the said defendant, in the manner therein and hereinafter mentioned. It was by the said indenture amongst other things witnessed, that in pursuance of the said agreement, and for the purposes aforesaid, and in consideration of the covenant thereafter contained, by and on the part and behalf of the said defendant to be performed; and also for and in consideration of the sum of 10s. of lawful money of *Great Britain*, to him the said *W. W.* in hand paid by the said defendant, at or before the sealing and delivery of the said indenture, the receipt whereof was thereby acknowledged: He the said *W. W.* bargained, sold, assigned, transferred, and set over, and by the said indenture, did (at the request, and by and with the consent, direction, and appointment of his said several creditors, testified by their being made parties to and sealing and delivering of the said indenture) bargain, sell, assign, transfer, and set over unto the said defendant, his executors, &c., all his property in indenture mentioned, [*stating it* ;] To have and to hold, receive and take the said property, and all and singular other the premises thereby bargained, sold, and assigned, or mentioned or intended so to be, and every part and parcel thereof, with their and every of their appurtenances; and the said defendant, his executors, &c., from thenceforth, as and for his and their own proper goods and chattels for ever, and in as full, ample, and beneficial manner, and as fully and effectually, to all intents and purposes, as the said *W. W.* could or might have held, possessed, or enjoyed the same, in case the said indenture had not been made;

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and it was by the said indenture amongst other things further witnessed, that for the considerations aforesaid, and in further pursuance of the aforesaid agreement, he the said defendant, for himself, his heirs, &c., did covenant to and with the said several creditors of the said *W. W.*, parties to the said indenture of the third part, and to and with each and every of them, and the executors and administrators of each and every of them, in manner and form following, that is to say; that he the said defendant, his executors or administrators, should and would *well and truly pay or cause to be paid unto the said several creditors of the said W. W., their respective executors, administrators, or assigns, the rate or sum of 7s. 6d. of lawful money of Great Britain, for every pound or 20s. of their several and respective debts or sums of money then justly due and owing to them respectively, by and from the said W. W., and which debts were set opposite to their respective names and seals, in the said schedule thereunder written* (not accounting any interest for the same, or any part thereof) by and at three equal payments, in the manner and proportions, and on the days and times therein and hereinafter mentioned, that is to say, &c.: as by the said indenture, relation being thereunto had, will, amongst other things, more fully and at large appear: and the said plaintiff in fact says, that by virtue of the said indenture, he the said defendant afterwards, to wit, on the 23d day of *June*, in the said year of our Lord 1786, entered upon and took possession of the said property, and all and singular other the aforesaid premises, according to the form and effect of the said indenture, to wit, at, &c.: and the said plaintiff in fact further says, that he the said plaintiff, before and at the time of the making of the said indenture, was one of the creditors of the said *W. W.*, to a great amount, to wit, to the amount of 800*l.* of lawful money of *Great Britain*, and at the time of

making of the said indenture *did, by himself, seal and deliver the same, and subscribe his name in the said schedule in the said indenture mentioned, as one of the said creditors of the said W. W. parties to the aforesaid indenture, and was and is one of the parties thereto*, to wit, at, &c. of all which said premises he the said defendant afterwards, to wit, on &c. there had notice; and although the said plaintiff, as such creditor as aforesaid, hath done, performed, and fulfilled every thing in the said indenture contained on his part and behalf to be done and performed, as such creditor as aforesaid, to wit, at, &c. aforesaid, yet protesting that the said defendant hath not done, performed, &c.; in fact, the said plaintiff says, that he the said defendant became liable to pay to the said plaintiff, at and after the rate of 7s. 6d. of lawful money of *Great Britain*, for every pound or twenty shillings of his said debt, so due and owing from the said *W. W.* to the said plaintiff as aforesaid, on the days and times, and in the manner and proportions, as in the said indenture is particularly mentioned and set forth; and although the said rate or sum of 7s. 6d. for every pound or twenty shillings of the said 800*l.* so due and owing as aforesaid, amounted to a large sum of money, to wit, to the sum of 300*l.* of like lawful money; and although the said 24th *June*, 1787, in the said indenture mentioned, is long since past, yet the said defendant hath not, although often requested so to do, yet paid the said sum of 300*l.* or any part thereof, to the said plaintiff, on the days and times, or in the manner and proportions in the said indenture mentioned, or at any other time, or in any other manner whatsoever, but the same, and every part thereof, remains wholly due, in arrear, and unpaid, contrary to the form and effect of the said covenant in the said indenture contained, to wit, at, &c.

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Pleas, *non est factum*; and for further plea, *actio non*, because, protesting that the said plaintiff, before or at the time of the making of the said indenture, was not nor is one of the creditors of the said *W. W.*, as the said plaintiff hath, in his said declaration above, alleged; nevertheless, for plea in this behalf, the said defendant says, *that there is not, nor ever was, any debt or sum of money whatsoever set opposite to the name and seal of the said plaintiff in the said schedule in the said indenture mentioned*; and this, &c.

Replication to second plea, *precludi non*, because that before and at the time of the making of the said indenture in the said declaration mentioned, the said *W. W.* was justly and truly indebted unto the said plaintiff in the sum of 994*l.* 8*s.* of lawful money of *Great Britain*, to wit, at, &c. aforesaid: and the said plaintiff further saith, that the said *W. W.* being so indebted to him the said plaintiff as aforesaid, he the said plaintiff afterwards, to wit, on the same day and year aforesaid, at, &c. aforesaid, duly executed the said indenture, and duly sealed and delivered the same, and then and there set his name to the said schedule then and there written under the said indenture as such creditor of him the said *W. W.* as aforesaid; and the said plaintiff further says, that the said plaintiff, at the time of the sealing and executing of the said indenture, not knowing the precise sum wherein the said *W. W.* stood indebted to him the said plaintiff, he the said plaintiff then and there omitted to set opposite to his name, in the said schedule, the amount of his said debt; but the said plaintiff further saith, that afterwards, and before the exhibiting of the bill of the plaintiff, to wit, on the same day and year aforesaid, at, &c. aforesaid, he the said defendant had notice of the said amount of the said debt, and that the same amounted to the sum of 994*l.* 8*s.* as aforesaid, and was

then and there requested by the said plaintiff to pay the said dividend of 7s. 6d. in the pound to the said plaintiff, but the said defendant then and there refused to pay the same to the said plaintiff, to wit, at, &c. aforesaid; and this the said plaintiff is ready to verify; wherefore, &c.

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Demurrer, and joinder in demurrer.

Chambre, for defendant. The objection to the replication is, that by it the plaintiff shows that he is not in a situation to sue the defendant. By the terms of the deed, no creditor became a party to it, unless he set the amount of the debt opposite to his name in the schedule. The plaintiff's debt does not appear on the face of the schedule: we cannot depart from the strict letter of the deed. The defendant in the present instance is not the original debtor, but merely a third person: he should be favoured. His covenant was to pay a specific ratio of the debts, and not a proportion of the produce of the effects. He is in a degree a surety.

Baldwin, for plaintiff. The defendant has not been prejudiced by the plaintiff's not setting his debt opposite his name. The defendant, at the time of executing the deed, knew that the plaintiff was a creditor, and he had subsequent notice of the amount of his claim.

ET PER CURIAM. The plaintiff's being a creditor at the time of executing the deed, made him a party to the deed. Defendant had notice of the amount of plaintiff's claim.

Judgment for plaintiff.

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By a charter-party, under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require:" the ship having been compelled to put into an intermediate port of her ports of loading and discharge, and the freighter having detained the vessel ten days there, and also fourteen days more than ten days at the port of delivery, in an action on the charter-party, it was held, that the master could not recover on this covenant for more than the ten days demurrage, at 5*l.* per day, at the port of *London*, the covenant not extending

DECLARATION in covenant on a charterparty, as follows: that whereas, by a certain charter-party of affreightment indented and made the 20th of *June*, 1788, at, &c., between the said plaintiff (by the name and description of *T. W. S.*, master of the ship or vessel called the *Vernon*, burden 600 tons or thereabouts, now in the river of *Thames*, outward bound, with a cargo of merchandize to *New York*) of the one part, and the said defendant (by the name and description of *Mr. T. Y.*, of *London*, merchant) of the other part, one part of which said charterparty of affreightment, bearing date the day and year afore-said, and sealed with the seal of the said defendant, the said plaintiff now brings here into court. It is witnessed that the said master had granted and let, and the said merchant had hired and taken the said ship to freight for the voyage, and on the terms and conditions following, that is to say: first, the said master did covenant, promise, and agree, to and with the said freighter by the said charterparty, that the said ship, being tight, staunch, and strong and well-manned, tackled and provided fit for merchants' service and the voyage therein-after mentioned, should, after the discharge of her said outward cargo at *New York*, and being fit and ready to receive goods, there load, receive, and take on board her from the said freighter, his correspondents, factors, or assigns, at any wharf where the said freighters, agents, or

to the payment of demurrage beyond ten days at each of the ports of loading and discharge; and a breach, averring that the plaintiff did not pay 5*l.* per day for demurrage for the extra delay beyond the ten days at the port of delivery, and for the delay at *Bristol*, as well as for the demurrage for ten days' delay at the port of delivery, was held bad (*a*).

a) See *Abbott on Shipping*, 4th ed. 194. 3 *Chitty's Commercial Law*.

assigns should order, (provided she could go along-side such wharf with safety) a full and compleat cargo of staves, oil, pot-ash, and other lawful goods and merchandizes, which he or they should or might think fit to load and put on board the said ship, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provision and furniture, and therewith directly, as wind and weather would permit, sail and return to the port of *London* or *Bristol*, as she might be ordered, and unload and deliver to the said freighter, his agents or assigns, all such staves, oil, pot-ash, and other goods and merchandizes which should or might have been by him or them laden on board the said ship at *New York* aforesaid, agreeable to bills of lading, and so on such delivering end her voyage (the perils and dangers of the seas, and restraint of princes and rulers during the voyage always excepted); and the said master further agreed that the said ship should lie at *New York* for taking on board her said cargo, and at *London* for delivering the same, seventy running days in the whole, if not sooner discharged; and also should on her homeward voyage, stop at *Falmouth* forty-eight hours for orders; in consideration whereof the said freighter did covenant, promise, and agree, to and with the said master, by the said charterparty, that he the said freighter, his correspondents, factors, or assigns, should and would fully and completely load the said ship at *New York*, aforesaid, with a cargo of staves, oil, pot-ash, and other goods, and receive the same out of her, at the port of *London*, in manner, and within the several days and times above limited for doing thereof, or days of demurrage thereafter mentioned; and also should and would well and truly pay or cause to be paid to the said master, in full, for the freight and hire of the said ship for the said voyage, in manner following, that is to say; for butt

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staves at the rate of sixteen pounds sterling per thousand; for pipe staves, at the rate of four pounds seventeen shillings and six-pence per thousand; for hogshead staves, at the rate of three pounds fifteen shillings per thousand; for barrel staves, at the rate of two pounds seven shillings and six-pence per thousand; for oil, at the rate of forty shillings sterling per ton; for pot-ash, at the rate of thirty-five shillings sterling per ton; and for all other goods freight as customary, together with the customary primage and pierage; *and that the said freight should be paid at the expiration of two months from the said ship's report at the Custom House, London; and lastly, the said master did consent and agree that it should be lawful for the said freighter, his factors or assigns, to keep the said ship on demurrage at her loading and delivery ports, ten days each, (beside the days above limited for her stay at the same) or as many of them as need should require; and he the said freighter did accordingly covenant and agree to pay to the said master for every day of such detention, the sum or value of five pounds sterling per day, each day daily, as the same should grow due, any thing aforesaid to the contrary notwithstanding, (as by the said charterparty) reference being thereto had, will, amongst other things, more fully appear; and the said plaintiff says that the said ship being tight, staunch, and strong, and well manned, tackled, and provided, fit for merchants' service; and the voyage contracted for by the said charterparty was, after the making of the said charterparty, and after the discharge of her said outward cargo at New York aforesaid, to wit, on the nineteenth day of September, in the year aforesaid, there ready and fit to receive goods, whereof the said defendant then and there had notice; and the said ship did for the taking on board her such cargo as is mentioned in the said charterparty, lie at New York aforesaid for a long space of time, to wit,*

for the said space of seventy running days by the said charterparty limited for the taking on board her said cargo, and delivering the same, not being sooner dispatched, during which time the said ship did there load, receive, and take on board her from the said defendant, his correspondents, factors, or assigns, a full and compleat cargo of staves, pot-ash, and such other lawful goods and merchandize as he or they thought fit to load and put on board her, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provision, and furniture; and the said plaintiff further says that the said ship did directly afterwards, as soon as wind and weather would permit, sail and proceed with the said cargo from *New York* aforesaid, towards and for *Falmouth* aforesaid, in order that she might there stop and wait for orders, according to the said charterparty; but that by reason of the perils and dangers of the seas in course of her said last-mentioned voyage, the said ship was afterwards, to wit, on the 25th day of *January*, in the year of our Lord, 1789, necessarily obliged to put in, and did accordingly put in at *Bristol* aforesaid, whereof the said defendant afterwards, to wit, on &c., last aforesaid, there had notice; and the said plaintiff further says that the said defendant having then and there ordered a part of the cargo so laden on board the said ship at *New York* aforesaid, to be delivered at *Bristol* aforesaid, and the residue thereof to be delivered at *London*; the said ship *did lie at Bristol aforesaid, for the purpose of unloading and delivering such part of the said cargo as was so ordered to be delivered there, for a long space of time, to wit, for the space of ten running days*, being so long kept on demurrage at *Bristol* aforesaid, by the said defendant, his factors or assigns, during which last-mentioned time the said ship did there unload and deliver to the said defendant, his factors or assigns,

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such part of the said cargo as aforesaid; and that having so delivered the same and sailed from *Bristol* aforesaid for the said port of *London*, with the residue of her said cargo; the said ship afterwards, to wit, on the 24th day of *June*, in the year last aforesaid, arrived therewith at the said last-mentioned port, and being on that day reported at the Custom House, *London*, was then and there ready to have unloaded and delivered to the said defendant, his factors or assigns, the residue of her said cargo, whereof the said defendant then and there had notice; and the said plaintiff further says that the said defendant, *his factors or assigns, did keep the said ship on demurrage at the said port of London, a certain other long space of time, to wit, the space of twenty-four days longer, during which last-mentioned time the said ship did there unload and deliver the residue of her said cargo to the said defendant, his factors or assigns, and so on such delivery ended her said voyage; and the said plaintiff in fact says, that although the money due and payable to the said plaintiff from the said defendant, for the freight of her said cargo so laden on board the said ship at New York aforesaid, and delivered out of her at the said ports of Bristol and London respectively, calculated after the respective rates, and in the manner in the said charterparty mentioned, amounted in the whole to a large sum, to wit, the sum of seven hundred pounds, and the customary primage and pierage that accrued during the said voyage amounted to another large sum of money, to wit, the further sum of eighty pounds, making together with the said sum of seven hundred pounds, the sum of seven hundred and eighty pounds of lawful money of Great Britain, whereof the said defendant afterwards, to wit, on, &c., at, &c., aforesaid, had notice; and although the space of two months from the said ship's*

report at the Custom House, *London*, is long since elapsed, yet the said defendant hath not (although often requested) paid the said sum of seven hundred and eighty pounds, or any part thereof, to the said plaintiff, but hath hitherto wholly refused and neglected so to do, and the same and every part thereof still remains and is wholly due and unpaid to the said plaintiff, contrary to the form and effect of the said charterparty, and of the covenant so made by the said defendant in that behalf as aforesaid : and the said plaintiff in fact further saith that the said defendant *did not during the respective times the said ship was so kept on demurrage by the said defendant, his factors or assigns, as aforesaid, pay to the said defendant or his assigns for every day of such detention, the sum or value of five pounds sterling per day each day, daily, as the same did grow due, or any part thereof, nor hath he, although often requested, &c., at any time since, hitherto paid the same or any part thereof to the said plaintiff, but hath hitherto wholly refused and neglected so to do ; and the same and every part thereof still remains and is wholly due and unpaid to the said plaintiff, contrary, &c.*

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Plea, taking issue on the first breach as to the payment of the freight, &c. ; and to the second breach defendant demurred, and plaintiff joined in demurrer.

Wood, for the defendant. The objection to the second breach is, that it is not warranted by the covenant. The plaintiff has declared to recover 5*l.* per day for 34 days' demurrage, whereas he should only have declared for 10 days' demurrage at the port of *London*. He admits there was no demurrage for any delay at *New York*, but proceeds to state that the defendant delayed the vessel 10 days at *Bristol*, and 24 days at *London*. Now the covenant is only for the

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payment of 5*l.* per day if there should be 10 days' demurrage at the port of delivery ; there is no covenant for the payment of 5*l.* per day for any further demurrage. The plaintiff was compelled to put into *Bristol*, but nothing is said of the payment of demurrage for any delay there. *Bristol* might have been, but was not, the appointed port of delivery. The breach of the covenant assigned, is general. The plaintiff might have waived any difficulty in this respect by assigning a general breach, for not unloading within the 70 days, and have declared at 5*l.* per day for the 10 days' demurrage at *London*. The jury would have then given him, in all probability, a verdict for the extra demurrage beyond the 10 days' delay at *London* ; and with respect to the demurrage at *Bristol*, the plaintiff could not recover it in an action on the covenant ; he should have brought an action of assumpsit (*a*).

Marryat, for the plaintiff. The question is as to the construction of the covenant for payment of demurrage. The words of the covenant are, that the freighter shall be at liberty " to keep the said ship on demurrage at her loading and delivery ports, 10 days each, " (beside the days above limited for her stay at the " same) or as many of them as need should require," the freighter covenanting to pay for every day of such detention, 5*l.* per day. It may be contended, that from this covenant the defendant was at liberty to keep the ship more than 10 days on demurrage ; at either the ports of discharge or delivery, on payment of 5*l.* per day, such a liberty would be implied, and such a construction would not militate against the express letter of the covenant. *Bristol* was a port of de-

livery, and it is expressly mentioned in the charterparty as one. The legal effect and meaning of the covenant is such, that it would be necessarily meant that 5*l.* was to be paid for any further delay than 10 days. There never is a different rate of demurrage for general demurrage and particular days'. The jury would give the 5*l.* per day beyond the 10 days, as the covenant for the payment of the 5*l.* per day during the 10 days would be the measure of their verdict. The rate of demurrage is in proportion to what the ship might have earned if it had been upon her voyage. *Roll. Ab.* 248, *pl.* 10. Even supposing the construction is against the plaintiff, yet he must have judgment to a certain extent, as the ship was detained for part of the time under the covenant averred in the declaration. For the objection is merely for want of form, and the defendant has not assigned a special cause of demurrer. The plaintiff avers the breach under a *scilicet*. 1 *Black.* 490. *Say.* 220. 2 *Str.* 1095.

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Wood, in reply. The objection is not for want of form. Plaintiff declares on an entire breach, in the non-payment of demurrage for the delay at *Bristol*, whereas *London* was the port of delivery. There were not, by the terms of the charterparty, to be two ports of delivery. In an action of covenant, where a general breach is assigned, if it be faulty in any part, it must fail as to the whole.

ET PER CURIAM. We must look to the words of the covenant, which only is for the payment of 5*l.* per day for so many out of 10 days' demurrage, at *New York*, or *London*, or at *Bristol*, if that was the ship's delivery port. There is no covenant for any payment for any further demurrage. How can we say that the jury would give 5*l.* per day for any further demurrage

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beyond the 10 days at each port? The objection is to the substance of the breach, and not to the form.

Judgment for defendant.

Under a proviso in a charterparty, that "the ship should lie at *New York* for taking on board her cargo, and at *London* for delivering the same, twenty running days in the whole, if not sooner discharged," the ship may be detained for these purposes seventy days at each place.

The plaintiff afterwards brought another action under the above charterparty; and amongst other breaches, assigned that the defendant did not complete her cargo at *New York* and receive the same out at *London* within 10 days, besides the 10 days allowed for demurrage, but on the contrary detained the same 11 days longer. The defendant demurred to this breach; and the Court held, that by the terms of the charterparty the freighter was to have 70 days for loading at *New York*, and 70 days for unloading at *London*; otherwise from what day would the days of detention commence? and gave

Judgment for defendant.

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THE KING against TAYLOR.

Easter Term.

In a conviction under the 2 Geo. 2, c. 26, s. 4, for working a boat in the river *Thames* for hire, without being qualified so to do, it must expressly appear from the evidence in the conviction, that the defendant worked the boat for hire.

THE defendant was convicted under the 2 Geo. II. c. 26, sec. 4, in the penalty of 10*l.* on the following conviction:—Be it remembered, that on, &c. at the Public Office, No. 1, *Well Close Square*, in the parish of, &c. *G. S.* and *M. C.*, two of the overseers and rulers of the company of wherry-men, watermen and lightermen, using, occupying, and exercising any rowing upon the river of *Thames*, betwixt *Gravesend* and *Windsor*, appointed by virtue of the statutes in that case made and provided, come before me, *J. S.* Esq. one of the justices, &c., assigned, &c., being the county and place where the offender hereinafter mentioned was found, and give me to understand and be informed, that *P. Taylor*, of, &c. mast-maker, *did on the said, &c. cause his servant to row or work a certain*

boat, called a skiff, upon the river Thames, in the said parish of, &c. for hire or gain, him the said P. T.'s said servant not being authorized by law so to do, contrary, &c. whereby, and by force of the statute in that case made and provided, the said P. T. forfeited for his said offence the sum of ten pounds of lawful money of Great Britain, for the use of the poor of the said company; and the said G. S. and M. C. pray that the said P. T. may be convicted of the offence aforesaid, according to the form and effect of the statute in such case made and provided; and thereupon afterwards, on, &c. at the parish of, &c. he the said P. T. after being duly summoned in this behalf, appeareth, and is present before me, the justice aforesaid, in order to answer the said complaint; and having heard the same, he the said P. T. is asked by me the said justice, if he can say any thing for himself why he should not be convicted of the premises above charged upon him, in form aforesaid, who pleadeth that he is not guilty of the said offence; nevertheless I, the said justice, now on the said, &c. at, &c. do proceed to examine into the truth of the said complaint in the presence of the said G. S. and M. C., and the said P. T.; and thereupon, now at this same time and place last aforesaid, one T. W., a credible witness in this behalf, cometh before me, the justice aforesaid, to prove the said charge contained in the said information against the said P. T., and before me the said justice, upon his oath on the Holy Gospel of God to him then and there by me the justice aforesaid administered, deposeth, sweareth, and on his oath aforesaid affirmeth and saith, that on Wednesday preceding the said, &c., he saw the said P. T.'s servant row a boat called a skiff on the river Thames from Wapping Old Stairs, loaded with a ship's top and trussell trees, down the said river, and that the said servant said he was going down to the ship Nancy in Bow Creek with the said top and trusse

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trees; and thereupon now, at this same time and place last aforesaid, S. P., another credible witness in this behalf cometh before me, the justice aforesaid, and before me, upon his oath on the Holy Gospel of God to him then and there by me the justice aforesaid administered, deposeth, sweareth, and on his oath aforesaid affirmeth and saith, that two days preceeding the said, &c., he saw a top in the said P. T.'s boat, called a skiff, at *Wapping Old Stairs*, alongside the causeway, and saw her go away from the stairs rowed by a person named *John*, aged about seventeen or eighteen years, who passed for a servant to the said P. T., and saw him the said J. S. without low water, to the outside of the tiers of shipping; that the charge of a waterman to carry the same top and tressel trees from *Wapping Old Stairs* on board the said ship in *Bow Creek*, would be 2s. or thereabouts; and the said P. T. being asked by me the said justice if he has got or can procure any evidence to contradict the proof aforesaid, he the said P. T. does not produce nor does he say he can procure any evidence to contradict or impeach the same, nor does he say any thing in his own defence touching and concerning the premises aforesaid, but he the said P. T. admits that his said servant J. rowed his skiff with the top and tressels on the said *Wednesday* last, before the fifth of this instant month of *February*, on board the *Nancy*, as he thought he had a right to, and ever had done; and the said P. T. does not pretend or alledge that his said servant J. had served for the space of seven years, or for any other time, to any waterman, wherryman, or lighterman, or that his said servant J. is one of the trinity-men, fisher-men, ballast-men, or persons employed in rowing or any ways navigating western barges, mill boats, chalk hoys, faggot and wood lighters, dung boats, or gardeners' boats, in such manner as has been accustomed and is allowed and re-

served by a certain act of parliament made in the 11th and 12th years of the reign of King *William III.*, intituled, an act for the explanation and better execution of former acts made, touching watermen and wherry-men rowing on the river *Thames*, and for the better ordering and governing the said watermen, wherry-men, and lightermen upon the said river, between *Gravesend* and *Windsor*; nor does he alledge any other matter in his defence; and thereupon all and singular the said premises being examined and heard, and by me the said justice fully understood, and mature deliberation being thereupon had, it manifestly appears to me the said justice, and I do adjudge and decide, that the said *P. T.* did unlawfully, on the, &c., cause his said servant *J.* to row and work upon the said river *Thames*, in the said parish of, &c., a certain boat called a skiff, for gain, him the said servant *J.* not being authorized by law so to do, contrary, &c.; and I do therefore adjudge and decide that the said *P. T.* is guilty of the premises above laid to his charge, in and by the said information: It is therefore adjudged by me the said justice, that the said *P. T.* be convicted, and he is hereby convicted by me the said justice, of the premises charged upon him in and by the said information, according to the form of the statute in that case made and provided, as aforesaid; and I the said justice do award and adjudge that the said *P. T.* hath for his said offence forfeited the sum of 10*l.* of lawful money of *Great Britain*, to be paid to the said rulers and overseers of the said company, or to the major part of them for the time being, to be by them paid and distributed to and for the use of the poor of the said company, according to the form of the statute in that case made and provided in witness whereof, &c.

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Marriott moved to make a rule absolute to quash

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the conviction in this case. He urged that there were several objections to it; but that the one wherein he must succeed was, that the evidence was insufficient, as it did not prove that the defendant worked the boat for any gain or reward, which was absolutely necessary to constitute an offence within the meaning of the act.

Erskine, contra. There is evidence sufficient to infer that the plaintiff caused the boat to be worked for hire and reward. You cannot follow the man to see whether he receives the hire. The defendant does not deny, or call the servant to prove, that he received nothing.

SED PER CURIAM. The conviction is insufficient. It should appear therefrom that the master did receive some hire. It cannot be inferred.

Conviction quashed.

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Mich. Term.

Where an act of parliament, in the enacting clause, creates a power to do certain acts, "except in the places hereinafter mentioned," and the exceptions are only specified in succeeding clauses, the party claiming under a right derived from such power, need not negative such exceptions (a).

THIS was a motion for a nonsuit, or in arrest of judgment, on a verdict found for the plaintiff. The declaration in the cause stated, that plaintiff before and at the several times hereafter mentioned

places hereinafter mentioned," and the exceptions are only specified in succeeding clauses, the party claiming under a right derived from such power, need not negative such exceptions (a). Where an act of parliament prescribes a particular remedy for an offence, it does not necessarily take away the parties' remedy by action; and where an act prohibited other persons than the scavenger from carrying away dust from houses in certain places, under a penalty of 10s. to be recovered before a magistrate; it was held that the scavenger might still have his remedy for an injury in this respect by action (b).—*Quare*, As to what is a sufficient property in a thing to maintain *trover*.

(a) *Sed vid.* observations of *Abbot, J.* in *Steele v. Smith*, 1 B. & A. 99. See also cases on this subject, 1 T. R. 141. 7 T. R. 27. 1 Lord Raym. 120.

(b) See 1 Burr. 543. 2 Burr. 749.

was, and from thence hitherto hath been and still is a scavenger, and the business of a scavenger hath for and during all that time used, exercised, followed, and carried on, and still doth use, exercise, follow, and carry on, to wit, at, &c. That plaintiff so being a scavenger, and so using, exercising, following, and carrying on the said business as aforesaid, after the making of a certain act of parliament, made in the parliament of our sovereign Lord *George the Third*, now king of *Great Britain, &c.*, at a session thereof holden at *Westminster*, in the county of *Middlesex*, in the 22d year of the reign of our said Lord the now king, and entitled “An act for better paving, cleansing, and lighting part of the parish of *St. George, Hanover Square*, in the county of *Middlesex*, and “such part of *Old Bond Street* as lies within the “parish of *St. James*, in the said county, and for removing and preventing nuisances and annoyances “therein,” to wit, on the 30th day of *March*, 1787, at, &c. aforesaid, a certain contract was made and entered into, in pursuance of the said act, by and between *G. W.*, Earl of *Coventry*, and others, naming them, committee men, whose names were thereunto subscribed, and seals affixed on behalf of themselves and the rest of the committee men duly elected and appointed to put in execution the said act of parliament, of the one part, and the said plaintiff of the other part; for him the said plaintiff to cleanse the paved streets, lanes, courts, alleys, mews, stable yards, and other places and passages in the said parish of *St. George, Hanover Square*, in the county of *Middlesex* aforesaid, except *Berkley Square, Oxford Street, Park Lane, Old and New Bond Street, Blenheim Street, that part of Stafford Street which leads from Old Bond Street to Albemarle Street, that part of Piccadilly from Clarges Street end to the turnpike at Hyde Park Corner,*

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and Grosvenor Square, for the term of three years, to be computed from the 8th day of April, 1787; during which term plaintiff, by virtue of the said contract, was entitled to the sole and exclusive privilege and benefit of carrying away and disposing of to his own use as hereafter mentioned, all the coal-dust, dirt, ashes, cinders, filth and soil, which should from time to time lie or be lodged or kept in any dust-hole, or in the areas or houses belonging thereto, or in any yards belonging to such houses, and carried away therefrom, other than except such coal-dust, dirt, ashes, cinders, filth and soil, as should during the said term be from time to time carried away and removed by the owner or owners thereof, for his or their own private use, and not for sale. Plaintiff did thereby covenant, promise, and agree to and with the said committee, authorized in and by the said act, and their successors (among other things) that he plaintiff, his executors or administrators, or some or one of them, should and would for and during and unto the full end and term of three years, to be computed as aforesaid, come one day (not being Sunday) in every week, or oftener if required so to do by writing, under the hands of any three or more of the said committee for putting the said act in execution, or their successors, or under the hand of the surveyor or inspector for the time being, with a sufficient number of servants and workmen, and also with a sufficient number of horses and teams, and with such covered carts or other carriages as should from time to time be approved of by the said committee, or their successors, or their surveyor and inspector for the time being, and with no other carts or carriages whatsoever, and such other useful and necessary utensils, materials and things, as should be also approved of by the said committee or their successors, into all and every the paved streets and other places within the

limits aforesaid, and take up and put into covered carts and carry away, all the coal-dust, dirt, ashes, cinders, filth, and soil aforesaid; and also forthwith from time to time carry and dispose of all such coal-dust, dirt, cinders, ashes, filth and soil, to or upon one or more proper laystall or laystalls,* or other convenient place or places, to be provided for that purpose by the said plaintiff, his executors or administrators, or some or one of them, such laystalls or places not to be within the said parish of *St. George, Hanover Square*, as by the said contract (amongst other things) more fully appears; and by means of the several premises aforesaid, plaintiff before and at the several times hereafter in this count mentioned, was entitled unto, and of right ought to have had, and still of right ought to have, the sole and exclusive privilege and benefit of carrying away and disposing of as aforesaid, all such coal-dust, dirt, ashes, cinders, filth and soil as aforesaid, to wit, at *Westminster* aforesaid, in the county aforesaid; and although plaintiff hath always from the time of making the said contract, hitherto well and truly performed and fulfilled the same in all things therein contained on his part and behalf to be performed and fulfilled, to wit, at *Westminster* aforesaid, in the county aforesaid, yet defendant well knowing all and singular the premises, but contriving and wrongfully and unjustly intending to injure plaintiff, and to deprive him of a great part of the said coal-dust, ashes, cinders, filth, and soil which he was so entitled to carry away and dispose of as aforesaid during the said term of three years, and whilst plaintiff was so entitled unto and had such privilege and benefit as aforesaid, to wit, on the 12th day of *April*, in the year of our Lord, 1787, and on divers other days and times between that day and the day of exhibiting the bill of plaintiff against de-

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defendant, at *Westminster*, in the county of *Middlesex*, wrongfully and unjustly, fraudulently and deceitfully, without the licence or consent, and against the will of plaintiff, carried away divers large quantities of the last mentioned coal-dust, dirt, ashes, cinders, filth and soil, to wit, 100,000 cart loads of dust, &c., of a large value, to wit, &c., which plaintiff was entitled to carry away for his own use and benefit, by virtue of the said contract, and converted and disposed thereof to his own use the said last-mentioned coal-dust, dirt, ashes, cinders, filth and soil, *not being dust, dirt, ashes, cinders, filth and soil carried away by the said inhabitants or their servants for their own private use*, but being dust, ashes, cinders, filth and soil, which plaintiff was then and there entitled unto under and by virtue of the said contract, and might and would otherwise have carried away and disposed of to his own use, whereby plaintiff lost and was deprived of the said last-mentioned dust, dirt, ashes, cinders, filth and soil, and all the profits, benefit, and advantage which might and would otherwise have arisen and accrued to him therefrom, and was and is otherwise greatly injured and damnified, to wit, at, &c. aforesaid.

2d count, for obtaining the dust under false pretence, that the defendant was the scavenger.

That plaintiff so being a scavenger, and so using, exercising, following and carrying on the said business as aforesaid, he, plaintiff, before and at the several times hereafter in this count mentioned, by virtue of his said proposal and contract, was entitled unto and of right ought to have had the sole and exclusive privilege and benefit of carrying away and disposing of to his own use all the coal-dust, dirt, ashes, and cinders at those several times *kept in any house or other premises in any of the paved streets, squares, lanes; courts, alleys, newses, stable yards, and other places and passages within the said parish of St. George, Hano-*

ver Square, in the county of Middlesex aforesaid, except Berkeley Square, Oxford Street, Park Lane, Old and New Bond Street, Blenheim Street, that part of Stafford Street which leads from Old Bond Street to Albemarle Street, that part of Piccadilly from Clarges Street end to the Turnpike at Hyde Park Corner and Grosvenor Square, carried away therefrom other than and except the coal-dust, dirt, ashes, and cinders carried away and removed by the owner or owners thereof for his or their own private use, and not for sale, to wit, at, &c., aforesaid; yet defendant well knowing all and singular the said premises, but contriving and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of a great part of the said last-mentioned coal-dust, dirt, ashes, and cinders, which he was so entitled to carry away and dispose of as last aforesaid, whilst plaintiff was entitled unto and had such privilege and benefit as last aforesaid, to wit, on the said, &c., and on divers other days and times between that day and the day of exhibiting the bill aforesaid, at, &c. aforesaid, wrongfully and unjustly sent, carried, and procured to be sent divers and very many carts and horses into the said streets and other places within the limits last aforesaid, for the purpose of carrying away the said last-mentioned coal-dust, ashes, and cinders; and then and there on those several days and times last aforesaid, at Westminster aforesaid, in the county aforesaid, falsely, fraudulently, and deceitfully pretended to divers and very many of the inhabitants of the said streets and other places within the limits aforesaid, having divers large quantities of coal-dust, ashes, and cinders in their houses and other premises there, and being desirous of having the same carried away and removed therefrom otherwise than for their own private use, and to divers and very many of the servants of such last mentioned inhabitants, that he, defendant, was the scavenger lawfully entitled and authorized to carry

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away the same, and did then and there on those several days and times last aforesaid, at, &c. aforesaid, by means of the said last-mentioned false, fraudulent, and deceitful pretences so made as aforesaid, wrongfully and unjustly, without the licence or consent, and against the will of plaintiff, obtain and procure from divers and very many of the said last-mentioned inhabitants and their servants, divers large quantities of the said last-mentioned coal-dust, dirt, ashes, and cinders, to wit, &c., of the value of, &c., and took and carried away the same, and converted and disposed thereof to his own use the said last-mentioned coal-dust, ashes and cinders, not being coal-dust, ashes, or cinders carried away by the said inhabitants or their servants for their own private use, but being coal-dust, ashes, and cinders which plaintiff was then and there entitled unto by virtue of his said contract, and might and would otherwise have carried away and disposed of to his own use, whereby plaintiff lost and was deprived of the said last-mentioned coal-dust, ashes, and cinders, and all the profits, benefit, and advantage which might or would otherwise have arisen and accrued to him therefrom; and was and is otherwise greatly injured and damnified, to wit, at, &c., aforesaid.

3d count, for
 wrongfully
 sending carts to
 obtain, and
 thereby obtain-
 ing dust.

That plaintiff, so being a scavenger, and so using, exercising, following, and carrying on the said business as aforesaid, plaintiff before and at the several times hereafter in this count mentioned, was entitled unto and of right ought to have had, and still of right ought to have the sole and exclusive privilege and benefit of carrying away and disposing to his own use all the coal-dust, ashes, and cinders at those several times kept in any house or premises in any of the paved streets, squares, lanes, courts, alleys, mews, stable yards, and other places and passages *within the*

said parish of St. George, Hanover Square, in the county of Middlesex aforesaid, except Berkeley Square, Oxford Street, Park Lane, Old and New Bond Street, Blenheim Street, that part of Stafford Street which leads from Old Bond Street to Albemarle Street, that part of Piccadilly from Clarges Street End to the turn-pike at Hyde Park Corner, and Grosvenor Square, and carried away therefrom, other than and except the coal-dust, ashes, and cinders carried away and removed by the owner or owners thereof for his or their own private use, and not for sale, to wit, at, &c. aforesaid; yet defendant well knowing the said last mentioned premises, but contriving and wrongfully and unjustly intending to injure plaintiff, and to deprive him of a great part of the said last-mentioned dust, ashes, and cinders, which he was entitled to carry away and dispose of as last aforesaid, whilst plaintiff was entitled unto and had such privilege and benefit as last aforesaid, to wit, on, &c., and on divers other days and times between that day and the day of exhibiting the bill aforesaid, at, &c., aforesaid, wrongfully and unjustly sent, and caused and procured to be sent divers and very many carts and horses into the said streets and other places within the limits last aforesaid, for the purpose of carrying away the said last-mentioned dust, dirt, and ashes, and then and there on these several days and times last aforesaid, at, &c. aforesaid, wrongfully and unjustly, without the licence or consent, and against the will of plaintiff, obtained and procured from divers and very many of the inhabitants and their servants, divers large quantities of the said last mentioned coal-dust, ashes, and cinders, to wit, &c., and took and carried away the same, and converted and disposed thereof to his own use the said last mentioned coal-dust, ashes, and cinders, not being coal-dust, ashes, and cinders carried away by the said inhabitants or their servants for their own

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private use, not being coal-dust, ashes and cinders which plaintiff was then and there entitled unto, and might and would otherwise have carried away and disposed of to his own use, whereby plaintiff has lost and been deprived of the said last mentioned coal-dust, ashes, and cinders, and all profits, benefit and advantage which might or would otherwise have arisen and accrued to him therefrom; and was and is otherwise greatly injured and damnified, to wit, at, &c., aforesaid. 4th Count in Trover.

4th count in
trover.

On the trial the jury found a verdict for the plaintiff. *Bearcroft* on a former day had obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered, or the judgment be arrested, for the following objections, *viz.* — First, that the plaintiff had no right vested in him by the statute mentioned in the declaration, *viz.* the 22d *Geo.* 3, c. 84. Secondly, that if he had such right he had no remedy beyond the specific performance given by the 20th section of the statute, to be recovered in a summary way before justices according to the 83d section, and not by action: and lastly, that supposing him to have a right and a remedy by action also, yet the declaration claimed the right too largely, by reason of the omission of many of the exceptions in the 79th and 80th sections, which are printed in italics in the following comparative scale of these exceptions.

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*Exceptions in Declaration, compared with the Act of
22d Geo. III. chap. 84.*

<i>Exceptions in Declaration.</i>	<i>Exceptions in Act—1326.</i>	<i>Observations thereon.</i>
1. Berkley Square.	1. Berkeley Square.	1st exception in declaration
2. Oxford Street.	2. Grosvenor Square.	9th exception in ditto.
3. Park Lane.	3. <i>Such part of the streets or other places adjoining or lying near to the said squares, as are directed to be cleansed by 6 and 14 Geo. III.</i>	Omitted in declaration. Are in doubt as to exceptions in 6 Geo. III. but submit 14 Geo. III. c. 62, pp. 1181 and 1182, as to the several streets leading into Grosvenor Square, or that abut upon or adjoin the same.
4. Old, and	4. That part of Piccadilly from Chorges Street to Hyde Park Corner.	8th exception in declaration.
5. New Bond Street.	5. From the south end of Park Lane to the north side of Hertford Street, under the management of particular commissioners.	Supposed to be included in 3d exception in declaration.
6. Blenheim Street.	6. Such part of Tyburn Road, or Oxford Road or Street under directions of commissioners of 10 Geo. III. for cleansing Marybone.	Supposed to be included in the 2d exception in ditto.
7. That part of Stafford Street which leads from Old Bond Street to Albemarle Street.		Omitted in declaration.
8. That part of Piccadilly from Chorges Street end to the turnpike at Hyde Park Corner; and		The exceptions here alluded to, are to be collected from the Kensington act, 7 Geo. III. p. 73, which extends from Hyde Park Corner to Kensington Palace Gates, and from the Terrace, at the west end of the town of Kensington, to the toll-gate near Holland House; and also the road from the north end of Park Lane, otherwise Tyburn Lane, to the north side of Hertford Street, in the parish of St. George, Hanover Square, and from the Uxbridge act, 7 Geo. III. extending from Tyburn to Kensington Gravel Pits.
9. Grosvenor Square.	7. <i>Any other parts of said parish of St. George, Hanover Square, which are cleansed by particular turnpike acts.</i>	
	8. <i>Any street or place which hath not heretofore been rated by any assessment by the parochial committee of said parish.</i>	Omitted in declaration.
	9. Old Bond Street.	4th exception in declaration
	10. New Bond Street.	5th ditto.
	11. Blenheim Street, and	6th ditto.
	12. Such part of Stafford Street as aforesaid	7th ditto.
	13. <i>The streets, lanes, courts, yards, or any other place or places situated before, or belonging to any royal palace ground or building, which now belongs, or hereafter shall belong to his Majesty, his heirs or successors.</i>	Omitted in declaration.

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Erskine now shewed cause against the rule. After making a few other observations, he said, that it was proved that the dust was taken in *Woodstock-street*, which was within the limits of the act of parliament. He urged that it was not necessary to take any notice of a proviso, but only of such exceptions as were in the *enacting* part of a clause; and the party, to take the benefit of a proviso, must shew it himself. *Salk.* 35. *Treby*, C. J. in *Jones v. Aron*, said, where an exception is incorporated in the *body of the clause*, he who pleads the clause ought also to state the exception; but when there is a clause for the benefit of the pleader, and *afterwards* there follows a proviso, which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso. 1 Lord *Raym.* 120. Independently of the statute, this was an offence to injure another man, by taking his property; and therefore the second objection can be of no avail. He may shape his remedy either on the statute, or for the injury at common law. The defendant takes property of the plaintiff of greater value than the penalty in the statute would recompence.

Bearcroft, *Baldwin*, and *Laws*, in support of the rule. The enacting clause, which gives the committee power to contract with parties for the sale of the dust, does not give them power to enter into such contract for the dust of the places excepted in some of the succeeding clauses of the act. The words of the clause, after giving them power to enter into such contract, are "except in the places after excepted." These words incorporate all the exceptions by reference. The declaration in any of the counts does not state such exceptions, or rather only states a part of them. The contract, for all that appears in the pleadings, might have been made for the dust of places within these exceptions. The contract is void as being too

large. This is not a mere common law right, where, if a party grant too much, it will pass all that he can grant; but in the case of a right created by statute, the party granting too much, avoids the grant of the right in *toto*. The plaintiff therefore has no right vested in him to sue. In general perhaps a declaration need not state the exceptions which are not incorporated in an enacting clause, and the other side will be bound to shew they are within the meaning of such exceptions; but this is not so here, as the exceptions are by reference incorporated in the enacting clause. The plaintiff might perhaps have avoided any difficulty in this respect, by adding a count, stating that he was entitled to the dust in that particular place where it was taken from him by the defendant. The count in *trover* will not avail the plaintiff; for until the scavenger has got possession of the dust, the property therein does not vest in him. The act permits him to make a contract with the committee; but the act does not expressly state the property in the dust to be given to the scavenger. There is no pretence for calling this a general property in the scavenger, because it is subordinate to the right of the owner of the dust. 2 *Strange*, 777. Till the scavenger has got possession, the owner may take it away for certain purposes; and no property is, during that time, vested in the scavenger. *Ergo, trover* is not maintainable. As to the other objection: the plaintiff must stand by the act itself. There is a prohibition (section 20) in the act, against every person but the owner, in certain cases, taking away the dust; and there is a penalty of 10s. for taking it away, to be recovered in a summary way before a magistrate, according to the 83d section, and not by action. On the construction of the whole clause there can be no remedy by action. The clause prescribes a particular remedy for the offence, which

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was not one at common law. *Rex v. Wright*, 1 Burr. 543.

The Court however were of opinion, that it was not necessary for the plaintiff to state the exception; that he was not precluded from recovering by the clause giving the penalty; and that the third count was clearly sustainable. No opinion was given as to the count in trover.

Rule discharged.

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Mich. Term.

HARRIS *against* CURNOW.

An award
which is bad as
to part, is bad
as to the whole.

DECLARATION in debt on money bond. Plea, after craving *oyer*, and setting forth the condition of the bond for the defendant's performance of the award of *T. R.*, *P. C.*, and *J. S.*, that no award was made. Replication, averring that the award was made as follows, *viz.* reciting that divers controversies and disputes had lately arisen between the said plaintiff and the said defendant, all which controversies and disputes were chiefly touching and concerning a road-way claimed by the said defendant, through the *Mow-hay* of the said plaintiff, situate, &c. they the said *M. T. R.* and *J.* three of the said arbitrators named in the said condition, did award and order that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, or depending between the said parties in law or equity, for any manner of cause whatsoever touching the road-way claimed as aforesaid, to the day of the date thereof, should cease and be no further prosecuted; and that each of the said parties should pay and bear her and their own costs and charges in anywise relating to or concerning the said premises; and they the said *M. T. R.* and *J.* did also award and order, that the said defendants should quit

all claim of them, or either of them, to the road-way in dispute as aforesaid, it appearing to them the said *M. T. R.* and *J.* by evidence, to be the property of the said plaintiff, and granted by lease (from his Grace the Duke of *Bolton*) bearing date, &c., and that they the said defendants, or either of them, had no right to the same; and also that they the said defendants, at their own proper costs and charges, should remove and replace, or cause to be removed and replaced, the hedge of the *Mowhay* aforesaid, there standing before the door of the house of the said defendants, or one of them, on or before, &c. next ensuing the date thereof, as it formerly stood, before the dispute between the parties; also they the said *M. T. R.* and *J.* did award and order, that the said defendants should have and enjoy the old road-way behind the house of them the said defendants, or one of them, as aforesaid, it appearing by evidence to them the said *M. T. R.* and *J.* that the said road-way behind the house aforesaid, was the sole and entire way to the same, being always formerly used, accustomed, and enjoyed to pass, carry, and recarry through the same, to and from the said house aforesaid; and they the said *M. T. R.* and *J.* did also award and order, that the said defendants, or one of them, should pay, or cause to be paid, to the said plaintiff or her assigns, the sum of 17*l.* 10*s.* of lawful money of *Great Britain*, on or before, &c., for damage and loss sustained by her, on account of the road-way so claimed as aforesaid; and lastly, the said *M. T. R.* and *J.* did award and order, that the said plaintiff and defendants, on payment of the money, and performance of the award above mentioned, should, in due form of law, execute each party to the other of them, general releases, sufficient for the releasing by each to the other of them, her, his, or their executors and administrators, of all actions, suits, arrests, quarrels, con-

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troversies, and demands whatsoever, touching and concerning the premises, or any matter or thing relating thereto, from the beginning of the world until, &c. ; and the said plaintiff protesting that the said defendants have not, nor hath either of them, performed any thing specified in the said award to be performed on their part, for replication saith, that the said defendants did not, nor did either of them pay, or cause to be paid to the said plaintiff, the said sum of 17*l.* 10*s.* mentioned in the said award, on or before, &c. therein also mentioned, according to the form and effect of the said award ; and this, &c.

Demurrer, and joinder in demurrer.

The demurrer was argued by *Shepherd*, for the plaintiff, and *Gibbs*, for the defendant ; the latter contending that the award was bad, as it attempted to give defendants a title, which, from the face of the award, they did not appear to have.

The Court thought the award was bad, as it must be taken altogether. The objection was, that the award was, that the defendants should be deprived of one road, and should have another ; whereas it did not appear from the award, that the defendants had any legal title to the road granted to them, the award not stating that the ground of the road belonged to either of the parties. 1 *Roll. Ab.* 292, was cited.

Judgment for defendant.

THE DOCK COMPANY AT KINGSTON-UPON-HULL
against HUNTINGTON.

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Mich. Term.

THE following was a special case for the opinion of the court, viz. This was an action of *assumpsit*, brought to recover a sum of 13*l.* claimed by the plaintiffs from the defendant, for certain duties under the *Hull Dock Act*, in part of which claim the defendant paid the sum of 6*l.* 10*s.* into court, whereby a balance of 6*l.* 10*s.* was the whole matter in dispute. The cause being tried at the last summer assizes for the county of *York*, before Mr. Justice *Wilson*, a verdict was found for the plaintiffs, with 6*l.* 10*s.* damages (being the said balance) and 40*s.* costs, subject to the opinion of this court upon the following case; and if the court should be of opinion for the defendant, a nonsuit was to be entered. That by an act of parliament, passed in the fourteenth year of the reign of his present majesty, intituled "An act for making and establishing public keys or wharfs at *Kingston-upon-Hull*," &c. The several persons therein named, were incorporated by the name of "The Dock Company at *Kingston-upon-Hull*." And by the same act it is, amongst other things, enacted, That in consideration of the great charges and expences which the making, building, erecting, and providing the bason, or dock key or wharf, reservoirs, sluices, bridges, roads, and works therein mentioned, and the supporting, maintaining, and keeping the same in repair for the future, would amount unto, there should be payable and paid, from and after the 31st *December*, 1774, to the said company, or their collectors or deputies, for their use, for every ship or vessel (the king's ships of war, and other ships and vessels employed in his majesty's service only excepted) coming into or going out of

Under a clause in an act of parliament, exempting ships from the payment of the same port or toll duties "more than once for the same voyage bout out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandizes;" held, that a vessel having cleared out of port at *Hull*, with a cargo of goods for *Mogadore*, on the coast of *Africa*, which she discharged, and there took in another cargo for *London*; discharged the same at *London*, and took in a cargo for *Hull*, with which she arrived at *Hull*, constituted two distinct voyages, and not within the exemption.

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the harbour, bason, or dock within the port of *Kingston-upon-Hull*, or unlading or putting on shore, or lading and taking on board, any of their cargo, or any goods, wares, or merchandizes, within the said port, by the master or commander, owuer or owners of every such ship or vessel, the several rates or duties of tonnage (according to the full of the reach and burthen) thereafter particularly rated and described; and, amongst other things; “for every ship or vessel trading between the said port of *Kingston upon-Hull*, and every port or place in the *West Indies*, *North* or *South America*, *Africa*, *Greenland*, or any place to the eastward of the *North Cape* of *Norway*, all places within the *Straits of Gibraltar*, and all islands and places in the ocean to the southward of *Cape St. Vincent*, not thereinbefore named, for every ton 1s. 9d.; which rates or duties should be, and were thereby vested in the Dock Company, as their own proper monies, and to and for their own proper use and behoof, for the purposes aforesaid, and should be paid at the time of the said ships or vessels’ entry inward, or clearance or discharge outwards; or in case any ships or vessels should not enter as aforesaid, then at any time before such ships or vessels should proceed from the said port, at the Custom House in the said port, so as no ships or vessels should be subject or liable to the payment of the same rates or duties, or any of them, more than once for the same voyage bout out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandize.”

In the year 1783, the defendant purchased a ship called the *Providence*, belonging to *Gainsbro*’, but which, at the time of such purchase, was lying at *London*, from whence she sailed for *Rockfort*, and there took in a cargo of goods, and brought the same

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to *Hull*. On her arrival at *Hull*, the Dock Company claimed duties for her entry into the port of *Hull*, which the defendant paid. On the 9th Oct. 1783, the *Providence* sailed from *Hull* to *Rockfort*, and returned back to *Hull* in the month of *March* following; and the defendant, on the ship's entry inwards, also paid dock duties. In the course of the three following years the *Providence* sailed ten times from *Hull* to *Rockfort*, and back again: the defendant, on the ship's entry inwards each time, regularly paid duties to the Dock Company. On the 4th *March*, 1788, the *Providence* cleared out at *Hull* with a cargo of goods for *Mogadore*, on the coast of *Africa*, which she discharged, and there took in another cargo for *London*; discharged the same at *London*, and took in a cargo for *Hull*, with which she arrived at *Hull* on the 18th *October* following. The question for the consideration of the court is, whether by the duties made payable by the said act, as hereinbefore stated, the plaintiffs are entitled to recover the duty of 1s. 9d. a ton, as for a voyage to *Africa*, or only the duty of 3d. a ton, which latter sum has been paid into court.

Chambre, for plaintiff. The question in this case is, whether this is to be considered all as one voyage. It clearly cannot: the discharging the cargo at *London* and taking in another, made it two voyages.

Serj. *Cockell*, for the defendant, was called on by the court, and who contended it was to be taken as all one voyage.

The Court, however, thought it two distinct voyages.
Judgment for plaintiff.

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*WADHAM against MARLOWE (a).**Mch. Term.*

Debt does not lie against a bankrupt on the reddendum of a lease for rent.

accruing after the commissioners' assignment, the lessor's assent to such assignment being virtually included in the act of parliament authorising the assignment of the bankrupt's estate. *Qu.* If an action of covenant would, in such case, lie against the bankrupt (*b*).

DECLARATION in debt on an indenture of lease between plaintiff and defendant, for rent due to the plaintiff thereon. The defendant, amongst other

(*a*) This same case, or rather, only the judgment in it, is reported in 8 *East*, 314. The arguments of the counsel, however, and the judgment of the court on the first argument of the case, will be useful, and which will be found in this report.

(*b*) In *Boot v. Wilson*, 8 *East*, 311, it was held, that *assumpsit* lies against a lessee from year to year, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and the occupation of his assignees during part of the time for which the rent accrued, which were pleaded in bar. And in *Mills v. Auriol*, 1 *H. Bl.* 433; 4 *T. R.* 94, it was held that the bankruptcy of the tenant was not pleadable in bar to an action of covenant, because the covenant was personal. And even now, after the passing of the 49 *Geo.* 3. c. 121, s. 19, unless the assignees, under the terms of that act, accept the lease, the bankrupt will be liable in an action of covenant for rent accruing due subsequent to the bankruptcy. *Copeland v. Stephens*, 1 *B. & A.* 593. By the 49 *Geo.* 3, c. 121, sec. 19, by which it is enacted, "That in all cases in which a commission of bankrupt shall be sued forth against any person after the passing of this act, and such person shall be entitled to any lease, or agreement for a lease, and the assignees shall accept the same, and the benefit therefrom, as part of the bankrupt's estate and effects, the bankrupt shall not be, or be deemed to be, liable to pay the rent accruing due after such acceptance of the same as aforesaid; and after such acceptance, the bankrupt shall not be liable to be in any manner sued in respect or by reason of any subsequent non observance or non performance of the conditions, covenants, or agreements therein contained: provided that in all such cases as aforesaid, it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the assignees shall decline, upon their being required so to do, whether they will or will not so accept such lease, or agreement for a lease, to apply by petition to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, praying that they may either so accept the same, or deliver up the lease, or agreement for the lease, and the possession of the premises demised, or intended to be demised, who shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and which shall be binding on all parties."

Under this section the general assignment does not vest the term in the assignees, and they are not bound to accept the term. 1 *Barn. & Ald.* 593. *Peake*, 238. 1 *Esp.* 223. 7 *East*, 335. 3 *Camp.* 340; but they should make their election promptly; and having once made it, they must

pleas, pleaded, that before the rent became due he became a bankrupt, stating the proceedings in the bankruptcy specially, and among others the assignment by the commissioners to the assignee, by virtue whereof the said assignee, before the rent became due, entered on the premises, and was possessed thereof until the expiration of the term. The plea did not state the plaintiff accepted rent from the assignee, or assented to the assignment. The plaintiff demurred generally to this plea, and the defendant joined in demurrer.

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Baldwin, for the plaintiff. The question is, whether a man, becoming indebted for rent after his bankruptcy, is liable to pay it. It has been the uniform opinion of the court, that where a debt becomes due after the bankruptcy, he is liable to it. *Aylett v. James*, 22 *Geo. III.* is in point.

abide by that decision. Various decisions have taken place as to what shall amount to an acceptance of the lease by the assignees. The act of putting up the bankrupt's interest in the lease to sale, is not of itself sufficient to make the assignees liable. *Turner v. Richardson*, 7 *East*, 335. But the acceptance of rent, &c. does. 1 *B. & A.* 593. And any intermeddling with, and assuming the management of a farm, will render them liable. 7 *Taunt.* 206. The entering upon, and taking possession of the bankrupt's leasehold premises, although the bankrupt's effects are upon those premises, and the assignees deliver up the keys immediately after the effects are sold, is sufficient to make them liable. 1 *B. & A.* 303. Assignees selling the bankrupt's reversionary interest of premises, of which he has also a lease, amounts to an acceptance. 2 *Stark.* 309. And if assignees refuse to give up possession of premises, this will be proof of acceptance. 2 *Stark.* 535.

This section does not apply to collateral securities, or to an assignee, but is confined to the case of a lessee; and where the plaintiff, a lessee, assigned his term to the defendant, who thereupon gave to the plaintiff a bond to indemnify him against the rent and covenants in the lease; the bond was forfeited, the defendant afterwards became bankrupt, and the assignee accepted the lease: held, that the plaintiff could recover on the bond, as he had not actually made any payment before the bankruptcy, and was therefore unable to prove under the commission; and as the court considered the statute 49 *Geo. 3.* c. 121, s. 19, not to apply to collateral securities or to an assignee, but to be confined to the case of a lessee. *Young v. Taylor*, 8 *Taunt.* 315.

The landlord may file a bill to compel the assignees to accept or not. 1 *Rosc Rep.* 445. 1 *Maddox*, 76.

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But the Court held clearly that in this action (which was an action of debt) the plaintiff could not recover, as debt was not maintainable after assignment. *Cro. Jac.* 334. And the court were rather inclined to think, that if it had been covenant in the case of bankruptcy, the lessee would not have been liable. *Vide Mayor v. Steward*, 1 *Barnes*, 61. But as to this they gave no opinion.

N. B. The parties afterwards desired leave to have it set down to be again argued.

Second argument.

Bearcroft, for plaintiff. On the former argument, counsel was prepared only to argue the general question; but we have a right to go into any fault in the plea. The case, *Marsh v. Brace*, *Cro. Jac.* 334, was cited, as being against the plaintiff; but that case was where the lessor has accepted rent from the assignee. Where the lessee assigns, the lessor has two strings to his bow. He may call upon lessee in respect of privity of contract, and upon assignee in respect of privity of estate. *Walker v. Harris*, 3 *Co.* 22. There the lessee had assigned, and the plaintiff brought an action of debt against the lessee, and it was held that the action lay. There are three privities between the lessor and lessee, viz. 1st, of estate; 2d, of contract; 3d, of both: and the privity of estate remains after the assignment, therefore debt lies till he has accepted the new tenant. 2 *Saund.* 181. 3 *Mod.* 325. In an action of debt against the executor of the original lessee, it was held maintainable as far as he had assets. *Barnes' notes*, *Canton v. Graham*. Therefore in case of a common assignment, the action clearly lies.

The next question is, whether the action is main-

tainable, the defendant being a bankrupt. It will be said the bankrupt has delivered up his all, and the land itself; therefore it would be hard if he should be now called upon. The same argument would apply in the case of a common assignment by him. The act of bankruptcy is his own act in general. The general principle is, that where the certificate discharges a debt, it must be due before the act of bankruptcy. This rent was due after the certificate. In *Aylett v. James, Mich. 22 Geo. III. C. B.* where the defendant pleaded his discharge under the insolvent debtors' act (to an action of covenant); yet even in that case it was held, the defendant was not to be discharged.

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Haywood, for the defendant. The rent must be paid out of, and not for the land. Where there is no express covenant to pay, and the land is out of the lessee's possession, an action will not lie. The *reddendum* will, in some cases, imply a covenant to pay, but not after he is out of possession. There is a great difference between an express covenant, and an implied covenant on the *reddendum*. 1 *Sid.* 447, is in point. This is upon the *reddendum*. 2 *Brownl.* 20. *Marsh v. Brace*, 2 *Bulst.* 151. *Lit. Rep.* 53. But admitting the whole of *Mr. Bearcroft's* argument, there are only two ways in which privity of contract may be disposed of. It may be transferred by act in law, or wholly destroyed. The assignees are the personal representatives of the bankrupt to all intents. A contract for goods, to be paid for at a certain day, is destroyed by the bankruptcy. The assignees are in the same situation as executors; it must be presumed, they have accepted the term, and if so, the bankrupt has no longer the possession: he is exonerated from all personal contracts. The privity of contract is totally destroyed. This action is upon the *reddendum*, and the rent must be taken to arise only under the *reddendum*. 3 *Co.* 22.

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Plow. 71. *Noy*, 75. 1 *Roll. Ab.* 236. Where a man is deprived, by act of law, of that out of which the rent issues, he is no longer liable. *Hob.* 92. The commission is an act of law. 1 *Atk.* 69. 7 *Vin.* 84. 4 *Burr.* 2439, 46, are in point. All the bankrupt acts are supposed to be against the bankrupts. The insolvent debtors' acts are in favour of insolvents; therefore the case in the Common Pleas does not apply. All the world are supposed parties to an act of parliament; and this assignment being under the bankrupt acts, it is as if the plaintiff had joined in the assignment.

Bearcroft, in reply. This is not an express covenant, but only a covenant in law. I deny that it is an assent to pay. All the cases I cited were of debt. It is then argued, that the notice and the acceptance of the assignment are the same thing. I admit that acceptance is notice, but the converse does not hold. In *March v. Brace* there was an acceptance. It is begging the question, when it is argued that this is the act of the law. It would be so if the defendant was no way accessory to it, but it is from his own act; and no man shall take advantage of his own wrong. He cited *Mayor v. Stewart*, 4 *Burr.* 2439.

Lord *Mansfield* gave the opinion of the court. He first stated the case, and then said, that two points have been argued at the bar on the part of the plaintiff; 1st, that if there had been no bankruptcy in the case, but the defendants had assigned the lease to a third person, yet that he would have been answerable in debt for the rent, unless plaintiff had accepted rent from the assignee. 2d, That the commission of bankruptcy, and the assignment under it, being founded on an act done by defendant himself, (viz.) the act of the bankruptcy, shall operate only as an assignment made

by defendant ; and therefore he is still liable to an action of debt for the rent, the plea not having stated the plaintiff accepted any rent from the assignee. As to the first point, we do not think it necessary that there should be an actual acceptance of rent from the assignee by the lessor, to discharge the lessee from the action of debt, which he is liable to on the *reddendum* ; but any assent to the assignment will have the same effect. The action of debt is founded not simply on the demise, but on the subsequent enjoyment ; and it is not necessary in such an action to state the deed at all. This point was much discussed and considered in the case of *Warren v. Consett, Ld. Ray.* 1500, where it was agreed that *nil debet* was a good plea in an action of debt for rent, because the specialty was only inducement, and the plaintiff need not set out the indenture. What shall be deemed to be an enjoyment by the lessee, is very much a question at law. The lessee cannot, by his own act (without the assent of the lessor), destroy the tenancy ; and therefore till such assent is given, the lessor may avow on the lessee as his tenant, notwithstanding an assignment has been made, and the assignee is actually in possession of the land. Upon such an avowry, evidence of enjoyment by the assignee, (not accepted rent by the landlord) would be proof of enjoyment by the lessee. For the defendant it was insisted, that notice alone to the landlord of the assignment was sufficient to discharge the lessee from the action of debt. But we think none of the cases cited warrant that position. In 1 *Brownl.* 22, and *Cro. Jac.* 334, acceptance of rent from the assignee is stated ; and in 1 *Sid.* 447 (which is a very short and incorrect note), it must be understood that there was an acceptance of rent, or an assent to the assignment by the landlord. And in 2 *Saund.* 181, which was an action of debt against an assignee before acceptance, it was held that the lessor might sue either

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the lessee or assignee. In the present case, neither acceptance of rent, or any assent by the landlord to the assignee, is stated in the plea; and therefore if the assignment under the commission has no other effect than an assignment by the lessee himself, we think that the defendant would be liable to pay the rent in this action. This brings the case to the second question, *viz.* what is the effect of the assignment under the commission of bankruptcy? Only two cases have been cited applicable to this point; for *Aylett v. James*, in the Common Pleas, is very distinguishable from the present, in the pleadings as well as in the question before the court. The two cases are *Mayor v. Stewart*, in *Burrow* and *Cantree v. Graham*, 1 *Barnes*, 69. The case of *Mayor v. Stewart* was determined on a different point, (namely) that the covenant on which the action was brought, was a distinct and independant covenant, which ran with the land. But a strong (though better) opinion was delivered by Mr. Justice *Yates* on this point; that as by the commission, &c. the bankrupt is divested of his whole estate, and rendered incapable of performing the covenant; it would be a hardship on him if he should remain still liable to it, when he is disabled by the act of parliament from performing it. The court afterwards adopted that opinion, and said, that in a case between the lessor and lessee, it might have seemed hard to leave the lessee liable to covenants, when an act of law had divested him of the emoluments, and vested them in his creditors. In *Cantrel v. Graham*, the court made a direct determination on the point, in a MS. note, from whence I shall cite it. The case is called *Canter v. Graham*; and there it is said, that Serjeant *Skyunner* moved that defendant might be discharged on common bail. It appeared that defendant, in 1727, had taken a house by lease, of the plaintiff, *Canter*, for nine years (with the usual covenants); that after three years he left it, and

one *Gukin* lived in it, who paid rent to the plaintiff; that in 1733, defendant became bankrupt, and his certificate was allowed and confirmed; and this action was brought against defendant for the rent of the two last years of the term, which had been incurred since the allowance of the certificate. The court said, by the bankruptcy the lease became vested in the commissioners, and is by them assigned to the assignees; so that from that time the defendant ceased to be tenant of the premises, and therefore he cannot be chargeable for the rent afterwards incurred; and the defendant was discharged on common bail. The counsel for the plaintiff endeavoured to impeach the authority of this case, by saying, the court might discharge the defendant on common bail, as a case of hardship; but at that time the court would not, against a positive affidavit of debt, have discharged the defendant on common bail, unless they had thought the law was clearly with him; and it is manifest, from the words in which the judgment was given, that it was founded wholly on the strict law of the case, and not on any circumstances to govern the discretion of the court. Legal reason is strong with the determination; for the estate is transferred and vested in the assignees, by virtue of the act of parliament respecting bankrupts; and every man's assent is virtually included in an act of parliament, and therefore it is equivalent to an express assent. It was admitted on the part of the plaintiff, that if the estate were divested out of the lessee, particularly by the act of law, without any fault of his, he would be discharged. This case must be so considered; for though the commission is founded on an act originally done by defendant (*viz.* by the act of bankruptcy), yet the commission and assignment, by virtue of the acts of parliament, are the actual and immediate cause of divesting the estate out

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ot the bankrupt *et in jure non remota causa sed proxima spectatur*. Therefore we are all of opinion there must be

Judgment for defendant.

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Easter Term.

BULLOCK against DOMMITT.

The assignee of a lease, whereby the lessee covenanted for himself and his assigns absolutely to repair premises without qualification, is bound to repair, notwithstanding they are destroyed by fire.

DECLARATION in covenant on an indenture of lease, between plaintiff and *J. Carhill*, the defendant being assignee of *John Carbill*, for a breach of covenant, that lessee and his assigns would, during the term, at his and their own proper costs and charges, well and sufficiently repair, uphold, support, sustain, maintain, glaze, pave, purge, empty, cleanse, scour, amend, and keep the said messuage or tenement and premises thereby demised, and every part thereof, with the appurtenances and the pavement, as well within the said premises as without in the street, so far as thereunto appertaineth; and all and every the pipes, wydraughts, sinks, privies, gutters, and glass windows to the said premises belonging, or in anywise appertaining; in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever

Plea, that the said messuage or tenement heretofore, to wit, on the 20th day of *September*, in the year of our Lord 1794, was by mere accident, and against the will, and without the neglect or default of the said defendant, or his servants or family, that is to say, by means of a fire which accidentally broke out in a house adjoining to the said messuage or tenement so demised as aforesaid, and communicated from such adjoining house to the said demised messuage or tenement, burnt down, consumed, and destroyed by fire, and has not since been rebuilt; and that the said defendant hath, from time to time, and at all times, since he the said *James* so as aforesaid became and was possessed of

and entitled to the said demised premises, with the appurtenances, under and by virtue of the said demise and assignment, when, where, and as often as need or occasion hath been and required, at his own proper costs and charges, well and sufficiently repaired, upheld, supported, sustained, maintained, glazed, paved, purged, emptied, cleansed, scoured, amended, and kept the said demised messuage or tenement and premises, and every part thereof, with the appurtenances, and the pavements, as well within the said premises as without in the street, so far as thereunto appertained, all and every the pipes, wydraughts, sinks, privies, gutters, and glass windows to the said premises belonging, or in anywise appertaining, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, save and except only the said messuage or tenement so burnt down, consumed, and destroyed by fire as aforesaid, since the same has been so burnt down, consumed, and destroyed by fire as aforesaid, according to the form and effect of the said indenture, and of the said covenant of the said *John Carbill*, so by him made in that behalf as aforesaid, in manner and form as by the said *John Bullock* hath in his said declaration in that behalf above alleged; and this he is ready to verify, &c.

Demurrer, and joinder in demurrer.

Shepherd, for the plaintiff. The defendant was bound to repair, at all events. *All. 27.* If the lessee is bound by a covenant to repair, he shall do it, notwithstanding all accidents. *Dy. 33. 2 Show. 401. Brown v. Quilter, 2 Com. Rep. 627. 2 Shower's Rep. 420.*

Wood, for defendant, admitted he could not distinguish this case from those cited; and

The Court gave

Judgment for plaintiff.

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1797.

EDWARDS *against* WILSON.*Trinity Term.*

An act of parliament, authorising trustees to improve public streets, and to sell waste lands to defray the expences of such improvements, and to use the money arising from such sales in such manner as they shall think fit, for the carrying the purposes of the act into execution, does not authorize them to expend such money in the opposition of a bill in parliament, which, if passed, would turn out disadvantageous to the purposes of the former act.

DECLARATION states, that whereas the said plaintiff, on, &c., and long before was, and from thenceforth hitherto hath been, and still is, clerk to the commissioners acting in the execution of a certain act of parliament, passed in the 32d year of the reign of his present majesty, intituled "An act for paving, cleansing, lighting, and otherwise improving the streets, lanes, and other public passages and places within the borough of *Derby*, and for selling a certain piece of waste ground, situate within the said borough, called *Nuns Green*, towards defraying the expence of the said improvements;" and the said defendant, during all the time aforesaid, was, and still is, one of the trustees appointed by virtue of a certain other act of parliament, made and passed in the eighth year of the reign of his present majesty, intituled "An act for selling part of a green, called *Nuns Green*, in the borough of *Derby*, in the county of *Derby*, and for applying the money arising from the sale thereof in the improvement of the remaining part of the said green, and for other purposes therein mentioned," for putting the said last mentioned act, and the several powers therein contained, in execution. And whereas also, after the passing of the said several acts of parliament, and whilst the said plaintiff was such clerk to the said commissioners as aforesaid, and whilst the said defendant was such trustee as aforesaid, to wit, &c. at, &c., the commissioners acting in execution of the said act of the thirty-second year of the reign of his present majesty, did, in due manner, give notice to one *J. T.*, one of the trustees appointed in the said act of the 8th year of the reign of his present majesty, and who, as such trustee, had acted in the

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trusts in such act mentioned (there being at the time of giving such notice, no clerk to the trustees appointed in or by virtue of the said last mentioned act); that the trustees appointed in and by virtue of the said act of parliament, made and passed in the eighth year of the reign of his present majesty, should, and they were thereby required to make and deliver to the plaintiff, their treasurer and clerk, a true, fair, and particular account in writing, of all money which should have been by the said trustees from time to time received by virtue of the said act of the eighth year of the reign of his present majesty, and how, to whom, and on what account such money had been paid, together with the proper receipts and vouchers for such payments, which said notice had, in due manner, been agreed to, and subscribed by the commissioners present at a certain public meeting of the commissioners, acting in execution of the said act of the 32d year of the reign of his present majesty, duly held at &c. on &c. the number of commissioners present at such meeting amounting to seven; and further, that the trustees appointed in or by virtue of the said act of the eighth year of the reign of his present majesty, did not under their hands, nor under the hands of any five or more of them, within one month next after such notice given by the said commissioners to the said J. T. as aforesaid, make up or deliver to the said plaintiff, a true, fair, and particular account in writing of all money which had been by the said trustees from time to time received by virtue of the said act of the eighth year of the reign of his present majesty, and how, to whom, and on what account such money had been paid, but on the contrary thereof wholly refused and neglected so to do, contrary to the form of the said act of the thirty-second year of the reign of his present majesty; and further, that the trustees appointed in or by virtue of the said act of the 8th year of the reign of his present majesty, from time to time received by

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virtue of the same act, divers sums of money, amounting in the whole to a large sum of money, to wit, &c. to wit, at, &c. and that the money, which at the time of giving such notice as aforesaid, remained in their hands, upon the balance of the account of the money received and paid by the said trustees, by virtue of the said last-mentioned act, amounted to a large sum of money, to wit, the sum of &c. to wit, at &c.; of which said several premises the said defendant afterwards, and after the expiration of one month from the time of giving such notice as aforesaid, to wit, on &c. had notice, whereby, and by force of the said act of the 32nd year of the reign of his present majesty, an action hath accrued to the said plaintiff, as such clerk as aforesaid, to demand and have of, &c. from the said defendant, as such trustee as aforesaid, on behalf of all the said trustees, the said sum of, &c. being the money remaining in the hands of the said trustees, upon the balance of such account as aforesaid, parcel, &c. There were also counts for money had and received as trustee, &c. and on an account stated. To this declaration the defendant pleaded the general issue, *nil debit*. In *Easter Term*, 1796, by a rule of his majesty's court of King's Bench, made in this cause, it was ordered, that the judgment which had been signed in this cause should be set aside, the defendant undertaking to admit every thing necessary for bringing on the question, *viz.* whether there was any balance in the hands of the trustees under the former act of parliament at the time of bringing the action, which is to depend upon the question, whether the sum of 94*l.* 17*s.* 7*d.* being the expence incurred in opposing the late act, ought to be allowed to the trustees under the former act, or ought to be recovered in this action, as a balance in the hands of the treasurer, and that he the said defendant is a trustee, against whom an action may be brought under the last act.

The cause came on to be tried at the last summer assizes, before Mr. Justice *Buller*, when the following case was made for the opinion of the court, viz. in 8th Geo. III. an act of parliament passed, intituled, "An act for selling part of a green, called *Nuns Green*, in the borough of *Derby*, and for applying the money arising from the sale thereof in the improvement of the remaining part of the said green, and for other purposes therein mentioned;" reciting that there was within the borough of *Derby*, in the county of *Derby*, a certain piece of ground, called *Nuns Green*, containing by estimation forty-eight acres, or thereabouts, on which the freeholders, owners, and occupiers of messuages, lands, and tenements, and burgesses within the said borough, had right of common. Also reciting, that several small buildings had lately been erected thereupon, and great damage had been done to the said green by persons digging gravel thereout, to the no small detriment and loss of the freeholders, occupiers, and burgesses, having right of common thereon, as well as to the prejudice of the health of the inhabitants of the said borough, by reason of the stagnated water and other nuisances. Also reciting that the said borough was, by the increase of trade, become very populous, and that there was a want of more dwelling houses for the inhabitants. Also reciting that if the said nuisances and incroachments on the said green were removed and prevented, and power given to sell part thereof, for the purpose of erecting dwelling houses and buildings thereon, and the money arising from such sale were applied in removing the said nuisances and incroachments, it would greatly tend to the benefit and advantage of the said freeholders, owners, occupiers, and burgesses, as well as of the other inhabitants of the said borough; it was therefore enacted, that the mayor and recorder of the borough of *Derby*, for the time being, the Right Hon. Lord

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Frederick Cavendish, the Right Hon. Lord *Scarsdale*, the defendant in this action, and forty-nine other persons, were thereby appointed trustees for putting the said act into execution. It is also enacted, that such part of the said *Nuns Green* as extends in length from the late dwelling house of *Gilbert Cheshire*, Esq. to the dwelling house of *George Manifold*, in depth not exceeding forty-five yards, should be vested in the said trustees and their successors for ever, freed and discharged from all right, title, or interest whatsoever, which the freeholders, owners, and occupiers within, and burgesses of the said borough of *Derby*, or any other person or persons, could or might have in or to the same, or any part thereof; in trust nevertheless to sell and convey the same, in the manner and for the purposes thereafter mentioned. *It was further enacted, that the said trustees, or any nine or more of them, should or might, out of such monies as should arise from the sale of the said ground, in the first place pay and discharge all the expences of obtaining the said act, and afterwards in removing and taking away the pinfold, setting up the same again, and of removing and taking away all other buildings, and all inclosures, and other incroachments whatsoever, and of improving the remaining part of the said Nuns Green, and of defraying all other expences attending the execution of the said act, in such manner as the said trustees, or any nine or more of them, should think most useful and beneficial to all parties interested therein.* It was further enacted, that it should and might be lawful to and for the said trustees, or any nine or more of them, and they were thereby authorised and empowered, to level and fill up all the pits and uneven places of the said green, and to ornament and improve the same in such manner as they should think most advantageous and beneficial; and that all the proceedings of the said trustees should be entered in a book or books to be kept for that purpose, and to be

signed by the said trustees, or any nine or more of them, or their clerk for the time being. And it is further enacted, that from and after the passing of the said act, the part of the said *Nuns Green* remaining unsold, should be and remain a common, on which the freeholders, owners and occupiers of houses, lands, and tenements, and burgesses of the said borough, should have right of common. That the trustees, in pursuance of the said act, soon after the passing thereof, disposed of the whole of such part of the ground which was vested in them, and directed to be sold, and from time to time, from the passing of the said act down to the year 1791, continued to act in the execution of the trusts of the said act, and expended the money arising from such sales, pursuant to the directions of the said act. In the year 1791, a bill was depending in parliament for paving, cleansing, lighting, and otherwise improving the streets, lanes, and other public passages and places within the said borough of *Derby*, and for selling a certain piece of waste ground, situate within the said borough, called *Nuns Green*, towards defraying the expences of the said improvements. About 2,000 persons had right of common on this *Nun's Green*; that about 1,600 persons signed a petition to parliament for the bill, and about 1,100 persons signed a petition to parliament against it, many having signed both for and against it. In *January*, 1791, thirteen of the trustees of the 8th *Geo. III.* by an advertisement in the *Derby* papers, called a meeting of the trustees, to take into consideration so much of the report of the committee appointed to prepare a plan for more effectually paving and lighting the streets of the said borough, as related to the said *Nuns Green*; and on the 16th *March*, 1791, at a meeting of the said trustees, held in pursuance of the said act, it was resolved, "that it is the opinion of
" this meeting, that as by the proposed bill for paving

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“ and lighting the streets of this town, it is intended
 “ to sell *Nuns Green*, the bill shall be opposed, and a
 “ petition presented to parliament for that purpose,
 “ the expence of which shall be paid out of the money
 “ belonging to the said green.” This resolution was
 entered in the proceedings of the said trustees, and
 signed by thirteen of them. In consequence of the
 above resolution the bill was opposed in parliament,
 and the sum of 94*l.* 17*s.* 7½*d.* the subject matter of this
 cause, was expended and paid by the treasurer to the
 trustees, on the 14th Nov. 1791, which bill was with-
 drawn.

In the 1792 an act passed, which was also opposed
 in parliament, intituled, “ An act for paving, cleansing,
 “ lighting, and otherwise improving the streets, lanes,
 “ and other public passages and places within the
 “ borough of *Derby*, and for selling a certain piece of
 “ waste ground, situate within the said borough, called
 “ *Nuns Green*, towards defraying the expences of the
 “ said improvements.” By which it is enacted, that
 certain persons therein described, should be commis-
 sioners for carrying the said act into execution; and
 the remainder of *Nuns Green* was thereby vested in
 them for the purpose of sale, and applying the money
 arising from the sale in such manner as therein men-
 tioned. *That the trustees, appointed by virtue of the said
 act of the 8th Geo. III. should, and they are thereby
 required, under their hands, or the hands of any five or
 more of them, within one calendar month next after notice
 should be given by the said commissioners to the clerk to
 the said trustees, or left at his last or usual place of abode,
 or if there should be no such clerk, upon such notice being
 given to any one or more of the said trustees, who have
 acted in the trusts of the said act of the 8th Geo. III.
 or left at their respective last or most usual place of abode,
 make up and deliver to the said commissioners, at a meet-*

ing to be held in pursuance of the said act, or to such other person as they should direct, a true, fair, and particular account in writing of all money which shall have been by the said trustees from time to time received, by virtue of the said act of the 8th Geo. III., and how, to whom, and on what account such money has been paid, together with the proper receipts and vouchers for such payments; and the said trustees shall pay all such money as upon the balance of such account, appear to be in their hands, or in the hands of any other person or persons, for their use or on their account, to the said commissioners, at a meeting to be held in pursuance of the said act, or to such other person as they should appoint, to be applied for the purposes of the said act; and if such trustees should refuse or neglect, at the time and in manner as aforesaid, to make out and deliver such accounts, or to produce and deliver the vouchers relative thereto, or make such payments as aforesaid, then and in any of the said cases the said commissioners are thereby empowered to cause an action to be brought against any one of the said trustees, on behalf of all the said trustees, in any of his majesty's courts of record at Westminster, in order to recover such money from the said trustees, with costs of suit. The commissioners under the last act of parliament duly proceeded to execute the powers thereof, and the plaintiff was regularly appointed their clerk and treasurer. And the said commissioners caused such notice to be given to the said trustees under the 8th Geo. III. as is required by the act of 32d Geo. III. requiring them to make up and deliver to the plaintiff a true, fair, and particular account in writing, of all money which had been from time to time received by virtue of the said act of the 8th Geo. III., and how, to whom, and on what account such money had been paid, together with the proper receipts and vouchers for such payments. That the trustees did deliver an account, with the proper receipts and vouchers; that

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in that account they took credit for the said sum of 94*l.* 17*s.* 7½*d.* expended pursuant to an order of the trustees, under the 8th *Geo.* III. of 16th *March*, 1791, in opposing in parliament the bill for selling *Nuns Green*. That there was no balance in the hands of the trustees at the time of passing the act of 32d *Geo.* III. unless the said sum of 94*l.* 17*s.* 7½*d.* is to be considered as such. The question is, whether the plaintiff is intitled to recover.

Clark, for the defendant, was called upon by the court to argue. The questions are, first, whether the application of the money by the parties was proper; and secondly, whether the form of action is proper. The trustees had a discretionary power under the former statute, to act as they should think most useful for the carrying the purposes of the act into execution. Now an application was made to parliament to take the trust out of their hands; and that *Nuns Green* should be sold to pay the expences of the act. The trustees did not act improperly in opposing the bill. No commoners opposed it; and the trustees applied the money in opposing it; and the bill was thrown out. Clearly the opposition of the bill was for the purpose of carrying the former act into execution; for if the bill had passed, the former act could not have been carried into execution. Mr. Justice *Buller* was of opinion for the defendant on this point. The other objection is, that this action cannot be maintained. The balance of the account, if any, can only be recovered; and here there is no balance: the treasurer is obliged to pay over the money when ordered by the trustees. The legislature did not mean to leave the question to a jury, to say whether the money was properly expended.

The Court, however, thought otherwise on both the points, and gave

Judgment for plaintiff.

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Hilary Term.

DECLARATION for goods sold and delivered to defendant, and on the common money counts, and account stated. The defendant pleaded the general issue. At the trial of this cause before Lord Chief Justice *Kenyon* and a special jury, at Guildhall, the sittings after *Trinity Term*, the jury found a verdict for the plaintiffs for the sum of 2584*l.* 12*s.*, subject to the opinion of the Court upon the following case, *viz.* *John Pedder*, and Co. the plaintiffs, are merchants, at *Cork, Ireland*. Messrs. *Watt* and *Walker*, the defendants, are merchants at *Liverpool*. Messrs. *Forbes* and *Gregory*, and their late partner Mr. *Burton*, were for many years merchants in *London*, and carried on business both during the lifetime of Mr. *Burton*, and afterwards under the firm of *B. Burton, Forbes*, and *Gregory*, down to the time of the failure of *Forbes* and *Gregory*, hereinafter mentioned. Messrs. *Caldwell* and Co. were bankers at *Liverpool*, with whom Messrs. *Forbes* and *Gregory* were partners in that business, only as the same was carried on at *Liverpool*; but Messrs. *Caldwell* and Co. had no concern in the house of *Burton, Forbes*, and *Gregory*, in *London*. *Pedder* and Co. corresponded, and had an account with the house of *B. Burton, Forbes*, and *Gregory*, in *London*, who acted as their bankers and agents, and on whom they drew bills, but had not any account with *Caldwell* and Co. At different times, between the month of *May*, 1784, and the month of *January*, 1792, *Pedder* and Co. supplied *Watt* and *Walker* with provisions to a considerable amount. In the course of these transactions, *Pedder* and Co. always ordered the payments to be made to their correspondents, *B. Burton, Forbes*, and *Gregory*, in *London*, but never, in any one instance, ordered such payment to be made to *Caldwell*

A direction by a debtor to his bankers, who were indebted to him in a larger amount, to place to the credit of his creditor (who was a debtor to the bankers), for goods sold, a sum of money, so as to make the same as a bill at one month, which the bankers consented to do, but who only considered it as a payment to be made at a future day, does not amount to a payment; and in a case of this nature, where the bankers became bankrupts before the day on which the credit would expire, it was held, the debtor was not discharged by such payment.

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and Co. *Watt and Walker* accordingly, from time to time, remitted by bills to *Burton, Forbes, and Gregory*, the several sums due from them to *Pedder and Co.* and always advised *Pedder and Co.* thereof. That in two particular instances, that is, in 1787 and 1789, *Watt and Walker*, being indebted to plaintiffs for provisions, paid the several sums due to plaintiffs to *Caldwell and Co.*, on account of *Burton, Forbes, and Gregory*, with directions that *Burton, Forbes, and Gregory* should credit the account of plaintiffs to the amount of such sums on a future day, as they did in the present case. That plaintiffs had notice from *Burton, Forbes, and Gregory*, of such credit being given by them, and acquiesced therein. In November and December 1792, *Watt and Walker* sent orders to *Pedder and Co.* to ship sundry provisions in the *John*, the *Trelawney*, the *Green Castle*, and the *Alathea*, for *Jamaica*, which were shipped accordingly. On the 4th February, 1793, *Pedder and Co.* wrote to *Watt and Walker* as follows, viz.: "The total amount of invoices, &c. per the sundry vessels, deducting 3*l.* per cent. discount as usual, makes 2474*l.* 0*s.* 7*d.* Irish, which sum, brought into *English* money at par, makes 2283*l.* 14*s.* 5*d.* sterling, and at your leisure you will please to remit the same to *B. Burton, Forbes, and Gregory, Esqrs. London*, for our account." *Watt and Walker* having an account with *Caldwell and Co.* as bankers, on the 25th February, 1793, gave the following order to them, viz.: "Place to the credit of Messrs. *B. Burton, Forbes, and Gregory*, 2283*l.* 14*s.* 5*d.*, so as to make the payment "the same as a bill at one month from this date to "Messrs. *Pedder and Co. of Cork. W. and W.*" On the same 25th February, *Caldwell and Co.* wrote to *Burton, Forbes, and Gregory* as follows, viz.: "Messrs. "*Watt and Walker* desire you will credit the account "of *John Pedder and Co.* 2283*l.* 14*s.* 5*d.*, as if a bill "for that sum had been sent this day at one month."

On the 27th *February*, *B. Burton, Forbes, and Gregory*, sent the following answer to *Caldwell and Co.* :
 “ We will credit Messrs. *John Pedder and Co.* on 28th
 “ *March 2283* 14s. 5d., on account of Messrs. *Watt and*
 “ *Walker*, and advise them thereof to-morrow.” On the
 28th of *February*, *Forbes and Gregory* wrote to *Ped-*
der and Co. “ We shall credit you on the 28th *March*
 “ by order of Messrs. *Watt and Walker*, of *Liverpool*,
 “ 2283*l.* 14s. 5d.” On the 10th *March*, *Pedder and Co.*
 received a letter from *Watt and Walker*, dated *Liverpool*,
 6th *March*, saying, “ We received your letters, the last
 “ under date the 4th ult. ; on examining your account
 “ therein contained, we find it right, and paid on the
 “ 23d ult. to Messrs. *Caldwell and Co.*, on your ac-
 “ count, 2283*l.* 14s. 5d. *W. and W.*” To which last-
 mentioned letter *Pedder and Co.* did not reply. On
 the 16th *March*, 1798, the house of *B. Burton, Forbes,*
 and *Gregory*, of *London*, stopped payment, and on the
 18th a commission of bankrupt was issued against
 them. On the 18th *March*, *Caldwell and Co.*, of *Liver-*
pool, stopped payment, and a commission of bankrupt
 was soon afterwards issued against them. That be-
 fore, and at the time when the above-mentioned letter
 of the 25th *February* was written by *Caldwell and Co.*
 to *Burton, Forbes, and Gregory*, and from thence con-
 tinually until the time of the several failures above-
 mentioned, *Caldwell and Co.* were indebted to *Watt*
 and *Walker* to a much larger amount than the sum or-
 dered to be paid by them to *B. Burton, Forbes, and*
Gregory, and that *Pedder and Co.* were, at the time of
 those several failures, indebted to *B. Burton, Forbes,*
 and *Gregory* in 1717*l.* 12s. 4d. No entry was made in
 the books of *B. Burton, Forbes, and Gregory*, to the cre-
 dit of *Pedder and Co.* for the amount of their account
 with *Watt and Walker*, except in a book which they
 call a prospectus book, which contains entries as a
 memoranda of payments to be made by *Burton, Forbes,*

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and *Gregory*, on future days, wherein the said sum of 2283*l.* 14*s.* 5*d.* was entered as a payment to be made on the 28th *March*; nor was any remittance, except as aforesaid, made by *Watt* and *Walker* to *B. Burton*, *Forbes*, and *Gregory*, on account of *Pedder* and Co., after the said letter' of *Pedder* and Co., dated the 4th *February*, 1793. No entry was made in the books of *Pedder* and Co. to the debit of *Burton*, *Forbes*, and *Gregory*, for the amount of the last account of *Pedder* and Co. with *Watt* and *Walker*, except in a book kept by Mr. *John Cotter*, the acting partner in the house of *Pedder* and Co., for the purpose of entering, as memoranda, the sums expected to be received and paid, and called by him a personal ledger; in which book the said *John Cotter*, on the 7th *March*, made the following entry to the debit of *Burton*, *Forbes*, and *Gregory*: "To remitted by *Watt* and *Walker* 2283*l.* 14*s.* 5*d.*" and in which book, under the same account, sometime in the month of *April* afterwards, he made the following entry: "deduct *Watt* and *Walker*'s money, which never was remitted, 2283*l.* 14*s.* 5*d.*" On the 17th of *October*, 1793, the said *John Cotter* wrote to the defendants as follows: "If we had any colour of support in insisting, at this moment, that *Burton* and Co. should credit us for the money, I would rather commence a suit with them than exchange another word with you." The question for the opinion of the Court was, whether, under all the circumstances, the plaintiffs are entitled to recover.

Scarlet, for the plaintiffs. The plaintiffs are entitled to recover. There are two points in the case; 1st, Whether any payment was made before the 28th *March*. 2dly. Whether the defendants were discharged by any future payments. The defendants give credit to *Burton* and Co.; but the latter only credit their account for payment to be made to the plaintiffs on

the 28th *March*. The plaintiffs have no credit given them till the 28th of *March*, which was after *Burton* and Co.'s bankruptcy. As to the second question, I contend, that the defendants were not by their acts discharged from any future responsibility. This was never considered as a payment, by any party. The plaintiffs never depended on the transaction as such. No bill has, in fact, been drawn, though the parties deal as if they had drawn one. The plaintiffs had a credit on the defendants for the money, till they had been paid by *Burton* and Co., which they expected on the 28th *March*.

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King, for defendant. What has happened did, in effect, amount to a payment of the defendants. In the case of a bill, a promise to consent to accept is an acceptance (a). If this can be considered as analogous, then *Burton* and Co. have discharged the defendants. *Pillans v. Van Merrop*, 3 *Burr.* 1663.

LORD KENYON C. J. This case was not reserved on account of any difficulty. The jury were of opinion with the plaintiff at the time of the trial. The question was, whether the money had been paid by any thing that has happened. *Forbes* and Co. and *Caldwell* and Co. were both bankrupts before the 28th *March*. They accepted the bill by agreement; but before the time of payment both parties became bankrupts.

Judgment for plaintiffs.

(a) Not so now, in the case of inland bills. See 1 & 2 *Gen. IV.* c. 78; and *Cox v. Troy*, 5 *Barn. & Ald.* 474.

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Mich. Term.

EVERETT and another, Assignees, &c. of Sheriffs of London, against TUNNARD, Gent. one, &c.

In an action on a bail bond, the return of the writ, on which the defendant in the original action was arrested, must be stated with certainty.

THIS was an action on a bail bond against the defendant, as one of the bail. The declaration stated, that whereas one *John Pike*, heretofore, to wit, on the 5th day of *October*, in the year of our Lord 1790, had been arrested, and was then in custody of the said *Geo. Mackenzie Macaulay* and *Rich. Carr Glyn*, then, and at the several times hereinafter mentioned, being sheriffs of the city of *London*, under and by virtue of a certain writ of our Lord the now King, commonly called a *latitat*, before them issued out of the said court of our said Lord the now King, before the King himself, at *Westminster*, in the county of *Middlesex*, by and at the suit of the said *John Everett* and *Francis*, against the said *John Pike*, and directed to the sheriffs of the said city of *London*, by which said writ our said Lord the King had commanded the said sheriffs that they should take the said *John Pike*, if he should be found in their bailiwick, and him safely keep, so that they might have his body before our said Lord the King at *Westminster*, on *Saturday* next after the morrow of *All Souls*, to answer to the said *John Everett* and *Francis*, in a plea of trespass, and also to a bill of the said *John Everett* and *Francis*, against the said *John Pike*, for thirty pounds, upon promise, according to the custom of the court of our said Lord the King, before the King himself to be exhibited; and that the said sheriffs should have there then that writ, which said writ had been, and was before then duly indorsed for bail for 15*l.* 11*s.*, by virtue of an affidavit of the cause of action of the said *John Everett* and *Francis*, in that behalf before then made and duly af-

filed of record in the said court of our said Lord the King, before the King himself, according to the form of the statute in such case made and provided; and which said writ, so indorsed for bail, had been, and was before then delivered to the said *Geo. Mackenzie Macaulay* and *Rich. Carr Glyn*, so being sheriffs of the city of *London* as aforesaid, in due form of law, to be executed, to wit at *Westminster* aforesaid, in the county aforesaid. And whereas the said *John Pike*, having been so arrested, and being in the custody of the said *George Mackenzie Macaulay* and *Rich. Carr Glyn*, so being sheriffs of the said city of *London*, under and by virtue of the said writ, for the cause aforesaid, they the said *Richard Carr Glyn* and *George Mackenzie Macaulay*, as such sheriffs as aforesaid, took bail for the appearance of the said *John Pike* at the return of the said writ, according to the form of the statute in such case made and provided; and upon that occasion the said *John Franklin*, as one of the said bail, then and there, to wit, on the said 5th day of *October*, in the year of our Lord 1790 aforesaid, at *Westminster* aforesaid, in the county aforesaid, by his certain writing obligatory, commonly called a bail bond, sealed with the seal of the said *John Franklin*, and now shewn to the court of our said Lord the King, before the King himself here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound unto the said *George Mackenzie Macaulay* and *Rich. Carr Glyn*, as such sheriffs as aforesaid, (by their names and addition of *Geo. Mackenzie Macaulay*, Esq. and *Rich. Carr Glyn*, Esq. sheriffs of the city of *London*;) in the sum of thirty-one pounds two shillings of good and lawful money of *Great Britain*, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said *John Franklin* should be thereto afterwards requested; subject nevertheless to a certain condition to the said

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writing obligatory subscribed, that if the said *John Pike* did appear before his Majesty at *Westminster*, on *Saturday* next after the morrow of *All Souls*, to answer the said *John Everett* and *Francis*, in a plea of trespass, and also to a bill of the said *John Everett* and *Francis* against the said *John Pike*, for thirty pounds, upon promises, according to the custom of his Majesty's Court, before his Majesty to be exhibited, then that obligation was to be void, and of no force, otherwise to stand and remain in full force, vigor, and effect, as in and by the said writing obligatory, and the condition thereof (relation being thereto had), will more fully appear; and the said *John Everett* and *Francis*, in fact say, that the said *John Pike* did not appear before his majesty at *Westminster*, on *Saturday* next after the morrow of *All Souls*, in the condition of the said writing obligatory mentioned, to answer to the said *John Everett* and *Francis*, in the plea and to the bill aforesaid, according to the exigency of the said condition, whereby the said writing obligatory became forfeited to the said *Geo. Mackenzie Macaulay* and *Rich. Carr Glyn*, as such sheriffs as aforesaid; and the said *John Everett* and *Francis* further say, that the said writing obligatory being so forfeited, and the money therein specified being wholly unpaid to the said *Geo. Mackenzie Macaulay* and *Rich. Carr Glynn*, they the said *Geo. Mackenzie Macaulay* and *Rich. Carr Glyn*, as such sheriffs as aforesaid afterwards, to wit, on the 11th day of *November*, in the year aforesaid, at *Westminster* aforesaid, in the county aforesaid, by a certain indorsement on the said writing obligatory, then and there duly made and attested, assigned over the said writing obligatory to the said *John Everett* and *Francis*, in pursuance of the statute in such case made and provided, as by the said assignment so made and attested and duly stamped before the commencement of this suit, and now shewn

to the court of our said lord the king, before the king himself here, the date whereof is the same day and year last aforesaid, more fully appears; by means whereof, &c. yet, &c.

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Demurrer for the following causes, viz. that it does not appear in or by the said declaration, when or on what day the said writ of *latitat* therein mentioned issued, or in what year the same was returnable; but it is only in and by the said declaration alleged, that the said *John Pike* therein mentioned, heretofore, to wit, on the 5th day of *October*, in the year of our Lord 1790, had been arrested, and was then in custody under and by virtue of a certain writ of *latitat*, before then issued out of the court of our said lord the king, before the king himself, returnable before our said lord the king, at *Westminster*, on *Saturday* next after the morrow of *All Souls*, without setting forth on what day, or in what year in particular, such writ of *latitat* issued or was returnable; and for that the said writ of *latitat*, in the said declaration mentioned, is not described with sufficient certainty, to enable the said *John Franklin* to dispute or offer any issue on the existence thereof, or on the fact of issuing the same; and for that it is not expressly averred in the said declaration, nor doth it thereby appear, that the said writing obligatory therein mentioned was conditioned for the appearance of the said *John Pike* at the identical day mentioned in the said writ of *latitat*, or that the said writ was to answer to the same plea and bill as are therein mentioned; but it is only generally stated, that the said writing obligatory was conditioned to appear on *Saturday* next after the morrow of *All Souls*, to answer to the said *John Everett* and *Francis* in a plea of trespass, and also to a bill of the said *John Everett* and *Francis*, against the said *John Pike*, for thirty pounds, upon promises, according to the

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and another
against
TUNNARD.

custom of his majesty's court, before his majesty to be exhibited, without any averment whatsoever connecting those facts and circumstances with the return, or cause of action, in the said writ of *latitat*; and for that it is not expressly alleged in or by the said declaration, nor doth it thereby appear, that the said assignment of the said writing obligatory in the said declaration mentioned, was attested by two or more credible witnesses (*a*): and for that the said declaration is in various other respects uncertain, argumentative, insufficient, and informal

Joinder in demurrer.

The counsel for the plaintiff admitted the insufficiency of the statement as to the return of the writ, and the Court gave judgment for the defendant, but gave the plaintiff liberty to amend.

(*a*) It is sufficient to state that the sheriff assigned the bond according to the statute, without alleging that the assignment was sealed or witnessed. *Willes*, 408—9, *n. a.* 2 *Saund.* 61—6. 1 *Wils.* 127. If the assignment be stated inaccurately, it is fatal. *Willes*, 409, *n. a.* 1 *Wils.* 121.

1788.

1. 1. 1. Term.

WHITMORE and others against PAPILLON and others.

The regulations of the 27 *Geo. 3.*, c. 13, s. 3, do not apply to the temporary allowances on foreign wines granted by 27 *Geo. 3.*, c. 31 (*a*); and such temporary allowances may be claimed, though the wines were exported more than 5 years before the regulations.

THIS was a special case for the opinion of the Court. An action was brought on the following declaration: That the plaintiffs, on the 9th *May*, 1787, at *London*, to wit, in the parish of &c. were, and long before have been, and still are, in copartnership together, and dealers in foreign wines, within the limits of the chief office of excise in *London*. That the defendants, on the same day and year were, and from

(*a*) The 1st and 7th sections of this act are now expired.

thence hitherto have been, commissioners of excise in *England*, to wit, at *London* aforesaid. That after the passing of a certain act of parliament, made and passed at the parliament holden at *Westminster* the 18th *May*, 1784, in the 24th year of the reign of king *Geo. III.*, and from thence continued, by several prorogations, to the 23d day of *January*, 1787, intitled “An act for making allowances to the dealers in foreign wines for the stock of certain foreign wines in their possession at a certain time, upon which the duties on importation have been paid, and for amending several laws relative to the revenue of excise” And between the 9th and 15th days of *May*, 1787. To wit, on the 12th day of *May*, in that year, the plaintiffs, so being such dealers in foreign wines, had divers large quantities of Portugal and Spanish wines, that is to say, 45 tons and 131 gallons of Portugal wine, every ton thereof containing 252 gallons of Portugal wine, and 1 ton and 5 gallons of Spanish wine, the said last mentioned ton containing 252 gallons of Spanish wine, in the stock of the plaintiffs, so being such dealers as aforesaid, within the limits of the said chief office of excise in *London* aforesaid, and which wines had been imported into the port of *London*, and for which several quantities of wine all the duties imposed for and in respect thereof had been before that time there paid, and were proved to be paid, to wit, at *London* aforesaid. That before the fifth day of *July*, 1787, to wit, on the 22d day of *June*, 1787, the plaintiffs, so being such dealers as aforesaid, then residing within the limits of the chief office of excise in *London*, to wit, at *London* aforesaid in the parish and ward aforesaid, did, according to the form and effect of the aforesaid statute, apply to the defendants, so being commissioners of excise as aforesaid, for the allowances by the aforesaid act granted, by a petition in writing, stating therein the amount of the allow-

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ance claimed by the plaintiffs, so being such dealers as aforesaid, and the several sorts and quantities of wine respectively, for and in respect whereof such allowance was claimed, and from whom the same was received, and that the same was the sole and entire property of the plaintiffs; to which said petition was annexed an affidavit, made and sworn by *John Whitmore*, the elder, one of the petitioners, before the said *Martin Whish* and *David Papillon*, defendants, then and there being two of the said commissioners of excise, to wit, at *London* aforesaid, verifying the particulars and matters stated in the said petition; and the plaintiffs aver, that at the time of making such claim, to wit, on the said 22d day of *June*, 1787, at *London* aforesaid, &c. the plaintiffs did produce to defendants, so then and there being commissioners of excise as aforesaid, a certificate, under the hand of the proper officer of the customs, certifying the duty of custom to have been paid for such wine, which said certificate was made out in such and the like form and manner, and such affidavit was made thereon as was used and practised, in order to obtain the drawback for wine shipped for exportation, according to the form and effect of the aforesaid statute; and the plaintiffs further aver, that the defendants, being such commissioners as aforesaid, were afterwards, to wit, on the same day and year aforesaid, satisfied that all the duties for the said quantities of wine so claimed by the plaintiffs, had been fully paid, to wit, at *London* aforesaid; and by reason of the premises, and by force of the said statute, the defendants, so being such commissioners as aforesaid, ought to have paid, and became liable to pay to the plaintiffs, out of the monies in the hands of the defendants, arising from the duties of excise upon foreign wine, by an act made in that session of parliament imposed, the sum of 65*l.* 18*s.* 11*d.* being the allowaunces upon the excess.

of the said foreign wines of the plaintiffs, after deducting 252 gallons thereof, by the said first mentioned act in that behalf directed, at the times and in the manner directed by such act, the defendants then and there having monies in their hands arising from such duties, sufficient to pay the said allowances, yet the defendants, so being commissioners of excise as aforesaid, not regarding the said statute so made as aforesaid, nor their duty in this behalf, but contriving, &c. have not, although often requested, paid to the plaintiffs, or either of them, the allowances granted by the said act, upon the said quantities of wine so in the stock of the plaintiffs, and so claimed as aforesaid, or any part thereof, according to the form and effect of the said act. But on the contrary, the defendants, so being commissioners of excise as aforesaid, have always refused to pay the same to the plaintiffs, and still refuse, to the damage of the plaintiffs of 1000*l*. To this declaration the defendants pleaded the general issue, not guilty, and have paid 507*l*. 6*s*. 1*¼d*. into court, whereupon issue was joined.

The cause came on to be tried at the sitting after *Easter Term*, 1788, at the Guildhall of the city of *London*, before the Hon. *Francis Buller*, one of the justices of our lord the king, assigned to hold pleas before the king himself; when the jury found a verdict for the plaintiffs, damages 152*l*. 12*s*. 9*¼d*., and costs 40*s*. subject to the opinion of the court on the following case. That the plaintiffs, on the 9th *May*, 1787, were, and still are, in copartnership, and dealers in foreign wine within the limits of the chief office of excise in *London*; and that the defendants, on the same day and year, were still, and are commissioners of excise in *England*. That after the passing the act of parliament in the declaration first mentioned, and

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between the 9th and 15th days of *May*, 1787, to wit, on the 12th day of said *May*, the plaintiffs being such dealers, had 45 tons and 131 gallons of Portugal wine, every ton thereof containing 252 gallons of Portugal wine; and 1 ton and 5 gallons of Spanish wine, the last mentioned ton containing 252 gallons of Spanish wine, in the stock of the plaintiffs, so being such dealers within the said limits as aforesaid, which wines had been imported into the port of *London*, and for which all the duties imposed for and in respect thereof had been before that time there paid, and were proved to be paid. That afterwards, and before the 5th day of *July*, 1787, to wit, on the 22d of *June*, 1787, the plaintiffs being such dealers as aforesaid, then residing within the limits of the chief office of excise in *London*, according to the form and effect of said statute, applied to the defendants, being such commissioners of the excise as aforesaid, for the allowances by the said act granted, by a petition in writing, stating therein the amount of the allowance claimed by the plaintiffs, being such dealers as aforesaid, and the several sorts and quantities of wine respectively for and in respect whereof such allowance was claimed, and from whom the same were received, and that the same was the sole and entire property of the plaintiffs; to which petition was annexed an affidavit, made and sworn by the plaintiff, *John Whitmore* the elder, before the defendants, *Martin Whish*, and *David Papillon*, then and there being two of the said commissioners of excise, verifying the particulars and matters stated in the said petition. That the plaintiffs, at the time of making such claim, to wit, on the 22d *June*, 1787, produced to the defendants, then and there being such commissioners of excise as aforesaid, a certificate under the hand of the proper officer of the customs, certifying the duty of customs to have been paid for

such wine, and also an affidavit, which certificate and affidavit thereon are hereto annexed, marked (A) (a). That the defendants, being such commissioners as aforesaid, were afterwards satisfied that all the duties for the said quantities of wine, upon which the allowances were so claimed by the plaintiffs as aforesaid, had been fully paid. That the amount of the allowances due in manner aforesaid to the plaintiffs upon the excess of the said foreign wines of the plaintiffs, after deducting 252 gallons thereof, supposing them

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(a) (A.) J. J. & W. Whitmore.

These certify, that the following wines were entered inwards, viz. forty-six gallons of Spanish wine, per *J. Roberts* and Co., 15th Nov. 1786; two hundred and eleven gallons and one-fifth Spanish wine, per *W. Browne*, 28th July, 1783, 31st March, 1781; eleven thousand four hundred and seventy-one gallons and four-fifths Portugal wine, per *J. J. and W. Whitmore*, 27th April, 1782; 8th, 17th Jan. 13th Feb. 8th Sept. 6th Nov. 1783; 28th Sept. 1784; 13th Sept. 21st, 23d Nov. 1785; 6th March, 3d May, 21st Oct. 7th Dec. 1786, for which his Majesty's duties were paid at the Custom House, London. Dated 16th June, 1787.

W. Richardson, D. C. H. Bushby.

Per Collector.

That the goods above-mentioned in this certificate are now to be before me, the day of

We, whose names are subscribed, do severally swear, or solemnly and sincerely and truly declare and affirm, that the duty for the goods in the within certificate, in the names of us or our principals, were paid and secured, on the day therein expressed; and that we sold or delivered the said goods to the persons undermentioned by us, or exported the same.

We, whose names are subscribed, do severally swear, or solemnly, sincerely, and truly declare and affirm, that the goods herein declared to be sold and delivered to us (or that the East India goods were cleared as under mentioned) were by us sold, delivered, or exported, as by us underwritten.

Importers Names.	To whom sold or delivered.	When and before whom sworn.	Buyers' Names, or by whom cleared off.	Of whom bought, and to whom sold or exported.	When and before whom sworn.
John Whitmore, for self and Sons; J. S. Giffenross, for Wm. Brown; John Wild, for John Roberts and Co.	For the wine within mentioned, delivered to J. J. & W. Whitmore, and delivered to Messrs. J. J. and W. Whitmore	16 June, 1787. J. Meller, 16 June, 1787. G. Brathwaite, 16 June, 1787. G. Brathwaite.	Benj. Newton, for J. J. & W. Whitmore.	Received of John Roberts & Co. Wm. Brown, part of the wine within mentioned.	J. R. 18 June, 1787. G. Brathwaite.

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intitled to the allowance upon their whole stock, is 659*l*. 18*s*. 11*d*., and the defendants have paid 507*l*. 6*s*. 1*d*. into court, being the amount of such allowance upon so much of the plaintiffs stock as hath been imported within three years before the 9th day of *May*, 1787. That the officers of the customs never grant certificates for the drawback upon foreign goods or merchandizes for exportation, which have not been imported within three years before the time of exportation. That the certificate granted at the Custom House, in order to obtain a drawback upon exportation, where a part of the wines appear to have been imported more than three years, is agreeable to the form annexed, marked (B.) (b). That the defendants

(b)

(B.)

In the *Mary*, *Samuel Howe*, per *Dunkirk*. *John Prust*.

The duties inwards for twenty gallons Portugal wine were paid by *Samuel Smith*, 15th *February*, 1787; fourteen gallons Spanish wine, were paid out of time. Dated *May*, 1788.

H. B. per Collector.

W. R. D. Compt.

William Holmes, agent to *John Prust*, maketh oath, that the goods above mentioned in this certificate, are now to be exported to *Dunkirk*, as real owner.

Wm. Holmes.

Sworn before me, the
day of *May*, 1788.

}
G. B. per Sur.

We whose names are subscribed, do severally swear, or solemnly and sincerely and truly declare and affirm, that the duty for the goods in the within certificate, in the names of us, or our principals, were paid and secured on the day therein expressed, and that we
* sold or delivered the said goods to the persons undermentioned by us, or exported the same.

We, whose names are subscribed, do severally swear, or solemnly, sincerely, and truly declare and affirm, that the goods herein declared to be sold, and delivered to us (or that the East India goods were cleared as undermentioned) were by us sold, delivered, or exported as by us underwritten.

Importers Names.	To whom sold or delivered.	When and before whom sworn.	Buyers Names, or by whom cleared off.	Of whom bought, and to whom sold or exported.	When and before whom sworn
J. Thomas, for Sam. Smith.	Sold to John Prust.	May, 1788. G. B. per Sur.			

have in their hands monies arising from the duties upon foreign wines, imposed by said act of parliament, sufficient to pay the said allowances claimed by plaintiffs, if they are entitled to the same. The question for the opinion of the court is, whether the plaintiffs are intitled to recover in this action. If the court shall be of opinion that the plaintiffs are entitled to recover, the verdict to stand; but if the court shall be of opinion that the plaintiffs are not entitled to recover, then a verdict to be entered for the defendants.

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The Court called upon *Wood*, for the defendants, who contended that the plaintiff was not entitled to a drawback upon the wines imported three years before claimed. The question arose on the 27 *Geo. III. c. 13, s. 3*, which must govern the statute 27 *Geo. III. c. 31, sec. 1 to 7*, which relate to stock in hand between the 9th and 15th *May, 1717*, and grants temporary allowances for such stock. The plaintiff cannot be entitled to drawback for any wine imported above three years. The form of the certificate is annexed. The statute says, there must be a certificate, in the like form, as usual. Now there is not a form of a certificate, where the wine is imported above three years. The construction contended for by the plaintiffs would be a bad consequence to the revenue; the party would get allowance for more than the duties paid, in some cases, as where the higher duties are now paid. The 5th section of the 27 *Geo. III. c. 31*, seems to authorize such a construction.

The Court, however, were clear, that the plaintiffs were entitled to the drawback.

Judgment for plaintiffs.

1772.

WARD *against* ANDREWS.*Trinity Term.*

The landlord of a tenant from year to year, though there is no reservation of the timber on the premises, may support trespass *vi et armis*, against a third person, for carrying it away, after it has been cut down (a).

THE plaintiff brought an action of trespass, for cutting and carrying away plaintiff's timber. The 1st count of the declaration was, for entering plaintiff's close, and cutting down and carrying away timber; 2d count, for cutting down and carrying away timber generally; and 3d, for carrying away timber. The defendant pleaded not guilty.

Upon the trial, at the last Lent assizes for the county of *Worcester*, it appeared, that in the month of *February*, 1771, an ash and an oak, which had grown upon the premises named in the declaration, had been cut down, of which premises, *Ann Andrews*, widow, the defendant's mother, was at that time tenant in possession, as lessee from year to year under the plaintiff, the owner of the inheritance; and that the defendant, during the possession of the premises by the said *Ann Andrews*, cross cut and carried away the wood, after it was so severed from the ground, and converted it to his own use. At the time of letting the premises to the said *Ann Andrews*, there was no reservation to the landlord of the timber, or trees growing thereon. The jury at the trial found a verdict for the plaintiff, with 30s. damages, subject to the opinion of the court, whether in this case, this action of trespass *vi et armis* can be maintained.

Cox, for plaintiff. This action of trespass is well brought. Though it may be true that the tenant has

(a) So if trees are excepted in a lease, trespass is maintainable, and not case; 8 *East*, 190; and so, if they are not excepted, 1 *Saund.* 322, n. 5. 7 T. R. 13. 2 *Camp.* 491.

a special property in the timber, to maintain an action against third persons for an injury to it, whilst it is growing, yet when severed it becomes the property of the owner of the soil. It is not necessary to have actual possession to maintain an action of trespass. *Lit.* 71. *F. N. B.* 91. *Bro. Ab. Trespass*, pl. 216. Here the trees had been cut down some time before the defendant carried them away, and the plaintiff was then clearly entitled to them. He cited *Alleyn*, 83. *Cro. Car.* 242. 13 *Hen.* VII. 9, 6. *Palm.* 327.

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against
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Bearcroft, for defendant. This was a general verdict, with damages in all the counts, and not for the mere carrying the timber away. [But this the court denied, and said that the case was meant to be on the last count, *de bonis asportatis*.] There is a distinction between trespass *vi et armis*, and trespass on the case. Property and possession must concur to support this action. Perhaps not actual possession is necessary; but here the plaintiff never had any possession. As to the case in *Alleyn*, 83, the point there determined was not before the court.

SED PER CURIAM. The plaintiff had sufficient possession to maintain this action.

Judgment for plaintiff.

COLOMBIES *against* SLIM.

1772.

Trinity Term.

PLAINTEIFF declared on a promissory note, for 100*l.* drawn by one *T. Moses*, and payable to the defendant, whom the plaintiff stated to be the immediate indorser to the bill. The defendant pleaded, that the first indorsement he ever made on the bill was made

An indorsee of a bill, without notice that a prior action is depending thereon, may, notwithstanding the pendency of such action, commence an action against the same defendant (a).

1772.

COLOMBIES
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SLIM.

to one *J. Graham*, to whom the defendant delivered the bill; and that before the plaintiff's commencement of this action, the said *J. Graham* commenced an action on the bill against the present defendant, which action was still pending. The plea did not state that the plaintiff had ever any notice of the action being commenced. To this plea the plaintiff demurred generally, and defendant joined in demurrer.

Davenport, for plaintiff. There are two objections to this plea: 1st, that it amounts to the general issue; and, 2d, that it is bad in substance. The plaintiff, being the holder of the bill, has no reason to enquire into what has been done by the person who indorsed it to him. It would hurt credit, if he was forced to enquire into what has been done by the prior holder.

The Court were of opinion that the plea was bad, for the reasons urged by the plaintiff. The court thought that an indorsee, without notice, was not bound by any thing done by a former holder. But that if a bill be taken by an indorsee (knowing that a former action was depending) with a view to oppress the defendant, it might be otherwise.

Judgment for plaintiff.

1772.

HUNTER against EARL of DE LORAINÉ.

Trinity Term.

A declaration in case against an Earl, stating the Earl to have been 'summoned to answer,' instead of 'attached,' is bad (*b*).

THE declaration stated, that *Henry*, Earl of *De Lorainé* (*a*) was summoned to answer *William Hunter*, in a plea of trespass on the case, and whereupon, &c., with counts for goods sold and delivered, &c. To this the defendant demurred as follows: For

(*a*) It is to be observed, that the plaintiff did not allege the defendant to have "privilege of peerage."

(*b*) See *Tidd's Forms*, 5th ed. 88. See *Vide* 1 Hen. Bla. 250. 1 Saunders, 318, n. 3. 1 Chitty on Pl. 286.

that it is alleged by the said declaration, that the said Earl hath been summoned to answer the said *William* in a plea of trespass upon the case, whereas it ought to have been attached, to answer the said *William* in the plea aforesaid, and not summoned; and for that no summons lies in an action on the case on promises; and for that the said declaration is in many respects uncertain, insufficient, and wants form, &c.

Joinder in demurrer.

Lord Mansfield. The declaration is bad. In an action on the case, the first process is an attachment.
Judgment for defendant.

DAVIS against SAUNDERS and others.

1770.

Mich. Term.

THIS was an action of trespass, wherein plaintiff, in the first count of his declaration, set forth that the defendants, on the 12th *March*, 1770, at *Topsham*, in the county of *Devon*, with force and arms, the goods and chattels, (to wit) 200 casks of brandy, and 200 casks of rum, of the plaintiffs, value 200*l.* there then being and found, took, and carried away, and converted and disposed thereof to their own use. In the second count plaintiff declared, that the defendant, on the said 12th of *March*, at *Topsham* aforesaid, with force and arms, a certain sloop of the plaintiffs, value 100*l.*, there then being and found, broke, damaged, and spoiled, whereby the plaintiff not only was obliged to lay out and expend, but did lay out and expend 10*l.* in repairing and amending the said sloop, but was prevented and hindered from using his said sloop for three weeks then next following, and other injuries, &c. to the plaintiff's damage of 300*l.* The defendants having pleaded the general issue of not

If, in the prosecution of a lawful act, an accident, purely accidental, arise, no action can be supported for an injury, arising from such accident.

1770.

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guilty, issue was thereupon joined, and the cause came on to be tried at the last assizes, held at *Exeter*, on *Thursday*, 9th *August*, 1770, before Mr. Justice *Ashurst*, when a verdict was found for the defendants on the first count of the declaration, and for the plaintiff on the second count, damages, 10*l.*, costs, 40*s.*, subject to the opinion of this honourable court on the following case: That the plaintiff was owner of a sloop, and the defendants owners of two other sloops. That having reason to believe there was a raft of brandy left in the sea by the smugglers at *Torbay*, several vessels went out in search of it. That *John Descent* was the first discoverer of the raft, and laid hold of it with his boat hook; but not being able to hold it, he left his boat hook sticking in the cable, and which boat hook remained visible above water. That *Descent* still continued there, and was about to return, but before he got up, *Davis*, the plaintiff, fixed his anchor to the cable to which the raft of casks was fastened, and drew them up to the bow of the vessel. That whilst *Davis* was getting in some of the casks, the defendants, *Saunders* and *Full* in one boat, and *Cookes* and *Bartlett* in the other, came up, and each got hold of another part of the raft. That whilst they had so hold, by the rolling of the sea, and blowing of the wind, their ships drove against the plaintiff's vessel, and did him damage to the amount of the verdict. That the casks which *Cookes* and *Saunders* took from the raft were immediately taken to the customs, and condemned in the Exchequer, no one laying a claim thereto. Whether the plaintiff is entitled to recover in this action for the damage done to his ship.

Burland, Serjeant, for plaintiff. Plaintiff was the actual possessor of the raft. If in the prosecution of an unlawful attempt to dispossess a man of goods in his possession, a damage is done, trespass may be

maintained. Even a person having an illegal possession, may support this action against any person but the legal owner. *Cro. Eliz.* 819. *5 Co.* 24. (b). *Stra.* 777. *1 Salk.* 290. *2 Saund.* 47, c. Nor is the intent or design of the wrong doer to be much considered (a). Where a soldier, exercising, discharges his musket, and hurts another; or a person in shooting at one but, hits another, trespass will lie. *Hob.* 134. *Stra.* 596. The question here is, whether it was not an unlawful attempt to dispossess plaintiff, who was in the actual possession of the raft. *Bro. Abr.* 358.

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Mansfield, for defendant. The jury have found the fact of possession of the brandy against the plaintiff, and therefore they have found, on the first count, against him; this is decisive as to the second count; if he had no possession, defendant would not be guilty of wrongful act. *Ld. Raym.* 1399. Here the injury was merely accidental. It is true, that even if it had been through negligence, it must have been an action of trespass.

Burland, in reply. When the first act was unlawful, though the injury had been intended to a third person, if an injury ensues to me, trespass lies. It is even so in the case of felony. If in prosecution of an unlawful act, a man is killed, it is murder.

THE COURT decided generally for the defendants upon the whole declaration, being of opinion, that the original act of the defendants was not unlawful.

Judgment for defendants.

(a) *3 Wils.* 309. *2 Bla. R.* 832. *3 East*, 599, 601.

1771.

SINCLAIR *against* THE HON. T. HERVEY.*Hilary Term.*

In action of *assumpsit* for use and occupation of lodgings by A. H., defendant's wife, at his request, the defendant cannot plead that A. H. was not his wife, as such plea would amount to the general issue, as well as tender an immaterial issue.

DECLARATION in *assumpsit*, for the use and occupation of furnished lodgings by *Ann Hervey*, the wife of the defendant, at defendant's request, and other common counts. Plea to the count for such use and occupation, because he says that the said *Ann*, at the said several times when the said promises and undertakings are above supposed to be made, was not, nor was she at either of them, the wife of the said *Thomas*, and this he is ready to verify; wherefore, &c. Demurrer, for that the plea aforesaid amounts unto the general issue only, and for that the said plea tenders and offers to put in issue a matter which is immaterial; and is, in other respects uncertain, insufficient, and wants form, &c.

Joinder in demurrer.

Serjeant *Jephson*, for plaintiff. It would be immaterial to prove that *Ann Hervey* was, in fact, the wife of the defendant. It would be sufficient to prove that she passed as such. If it would be material to prove it, the defendant would have had the advantage of it on the general issue. This plea amounts to the general issue: and

The Court being of this opinion, gave

Judgment for plaintiff.

CHAPMAN, *on the demise of* SCHOLES *against*
SCHOLES.

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Mich. Term.

JAMES SCHOLES, being seised in fee of the premises in question, made his will, dated 12th December, 1751, in the words following; to wit, "In the name of God, amen. I *James Scholes*, of *Walkmile*, within *Chadderton*, in the county of *Lancaster*, yeoman, being of sound mind and memory, do make this my last will and testament, in manner following; and first, I order that all my just debts, funeral and other expences, be paid out of my personal estate; and also the following legacies, to wit, to my nephew, *John Scholes*, son of my late brother, *John Scholes*, I give fifty pounds; to my nephew, *John Scholes*, son of my brother, *Thomas Scholes*, I give fifty pounds; to my nephew, *Richard Hartley*, son of my brother-in-law, *William Hurtley*, I give fifty pounds; to my niece, *Molly Hutchinson*, daughter of my late sister, I give fifty pounds; all which above said legacies shall be paid without interest, when and as the said several legatees attain their respective ages of twenty-one years; and if any of them happen to die before their attainment to full age, then the legacy or legacies of him, her, or them so dying, shall cease and be void for the benefit of my two daughters, *Hannah* and *Jane Scholes*. Also I give to my brother, *Richard Scholes*, one hundred pounds; and until the said several fifty pounds legacies become respectively due as aforesaid, I order the same, and also the remainder of my personal estate, to be converted into ready money by my executors, to be by them placed out and improved at interest in the best manner they can, for the benefit and advantage of my said two daughters, and for their two brothers, *T. Scholes* and *R. Scholes*, and my nephew *J. Scholes*, son of my late brother *J.*, their heirs and assigns for ever, to take as tenants in common: "it was held, that the daughters only took an estate tail with remainders over.

Under a devise as follows:

"And as touching my real estates, both freehold and leasehold, situate, &c. I devise the rents and profits thereof to my executors hereafter named, until my daughters attain their several ages of 21 years, in trust that they, my executors, improve the same in like manner and purpose as I have hereby directed my personal estate, for the advantage and education of my daughters; and as to the freehold and inheritance of my real estate, I devise the same to my said daughters, when and as they attain their several ages of 21 years, equally between them and their heirs for ever, to take as tenants in common: Provided that if both my daughters die without lawful issue, then I devise my real estates unto and amongst my said son of my late brother *J.*

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maintenances and educations until they severally attain their ages of twenty-one years, at which times I give the said personalty and improvement thereof unto my two daughters, equally betwixt them; and if both of them happen to die in their minorities, and without issue, then I give the residue of my personal estate, and the improvements thereof, unto and amongst my two brothers, *Thomas and Richard*, and my nephew, *John Scholes*, son of my late brother, *John Scholes*, and the survivors or survivor of them, his and their executors and administrators. *And as touching my real estates, both freehold and leasehold, situate, &c. I devise the rents and profits thereof to my executors hereafter named, until my daughters attain their several ages of twenty-one years; in trust, that they my executors improve the same in like manner and purpose as I have hereby directed my personal estate, for the advantage and education of my daughters; and as to the freehold and inheritance of my real estate, I devise the same to my said daughters when and as they attain their several ages of twenty-one years, equally between them and their heirs for ever, to take as tenants in common; provided that if both my daughters die without lawful issue, then I devise my real estates unto and amongst my said two brothers, Thomas Scholes and Richard Scholes, and my nephew, John Scholes, son of my late brother John, their heirs and assigns for ever, to take as tenants in common.* Also I request my executors do in due time after my death, renew the lease of my tenement in *Pilsworth*, which I hold under *Sir Ralph Asketon*, Bart.; and hereof I nominate and appoint my said brothers, *Richard and Thomas Hutchinson*, and *William Hartley*, my brothers in law, joint executors of this my will; and do give unto them the tuition and guardianship of my two daughters, and the management of their fortunes; and in testimony hereof, I the said *James Scholes* have hereunto put my hand and seal this twelfth day of *December*, in the year of our Lord

one thousand seven hundred and fifty-one. *James Scholes*, (L. S.)” The testator died soon after, without altering his said will, leaving issue two daughters, *Hannah* and *Jane*; *Hannah* having attained her age of twenty-one, died in *May*, 1766, intestate, and without issue. *Jane*, having attained her age of twenty-one, entered into possession of the whole premises, and died in *September*, 1768, intestate, and without issue. *John Scholes*, the father of the testator, left issue four sons, viz. *John*, the eldest, *Thomas*, *James* (the testator), *Richard* (the defendant). *John Scholes*, the eldest son of *John Scholes*, and brother of the testator, died, leaving issue *John Scholes*, the devisee of one third part of the premises. The last-named *John Scholes* died in *October*, 1762, leaving issue *Mary Scholes*, the lessor of the plaintiff, his only child, and heir at law. *Thomas Scholes*, the second brother of the testator, and devisee of one other third part of the premises, died in 1765, without issue. *Richard*, the youngest brother of the testator, and devisee of the remaining third part of the premises, did, upon the death of *Jane*, the younger daughter of the testator, take possession of the whole premises, and is the present defendant for all the said premises. At the trial of this cause at *Lancaster* assizes, the 14th *August*, 1771, before Mr. Justice *Willes*, the jury found a verdict for the plaintiff for the whole premises, subject nevertheless to the opinion of the Court of King’s Bench upon the above case, as to one undivided third part of the said premises claimed by the defendant under the said will.

Arden for plaintiff. The question is, what estate the two daughters took, whether in fee or tail. I contend, that they took an estate in fee, defeasible on their dying before twenty-one, without issue. If the devise had been to them and their heirs, and if they should die without issue, then to the other devisees.

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they would then have taken an estate tail. The intention would be clear; but here it is not so: for it appears the other way. See *2 Ves.* 186. It was the intention of the testator to provide for his daughters. The only thing he had further in contemplation was, if they should respectively die before the age of twenty-one, when they had a right to dispose of the estate. If they took an estate tail, it must be with cross remainders to each. I say, that the will must be construed as passing an estate in fee, defeasible only on their dying without issue before twenty-one. *2 Atk.* 524. *Strong v. Cummin*, *2 Burr.* 767. *Doe v. Newman*, *11 Geo.* 3.

The Court, without hearing counsel for the defendant, were clearly of opinion in his favor, viz. that the daughters only took an estate tail, with remainder over.

Judgment for defendant.

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Hilary Term.

FRASER against SKEY and others.

In breach of covenant on defendant's demise, for not having title to demise for the whole of the term demised, whereby plaintiff's assignee of the lease was evicted, and plaintiff put to costs in an action against him by such assignee, for such eviction; plaintiff must shew who evicted the assignee; and merely stating that a third person was seised in fee of the premises, and that the assignee was evicted generally, is not sufficient (a).

DECLARATION in covenant, on an indenture of lease dated 15th June, 1750, between defendant Skey, and other defendants' wives, whilst they were

Semble, under the word "demise," the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term, whereby plaintiff was put to expence in procuring a better title for whole term.

(a) In action of vendee against vendor for breach of covenant for good title, stating that plaintiff was ejected by third person, and incurred great expence, the plaintiff must shew in some manner, that the person evicting does not derive title from him; and without this qualification the special averment of "having lawful right and title," &c. would be bad, after verdict. *Cro. Jac.* 315. *2 Saund.* 177. *1 Lev.* 301. *1 Sidd.* 466. *1 Mod.* 290. See *9 Price*, 43. And as to the mode of alleging it, see *1 Show.* 70. *2 Lev.* 37. *3 Lev.* 325. *4 T. R.* 617, &c. *2 Bos. & Pul.* 14, n. b. *3 Chitty* on Pleading, 334.

unmarried, and plaintiff; whereby, in consideration of the sum of 40*l.*, laid out by defendant in the repairs of the premises, and for other considerations thereafter mentioned, they did demise, lease, and to farm let, unto plaintiff, a certain messuage or tenement, &c. The lease containing covenants to repair, &c. Declaration averred, that plaintiff assigned the premises to *S. Stephenson* for the remainder of the term of eighteen years, &c.: To have and to hold the same unto the said plaintiff, his executors, &c., from the feast of the nativity of *St. John the Baptist*, then next ensuing, for and during, and unto the full end and term of eighteen years two calendar months and twenty-one days, from thence next ensuing, and fully to be compleat and ended, yielding and paying therefore, yearly and every year, during the first eighteen years of the said term thereby letten unto the said defendant *Skey*, his executors, &c. the yearly rent or sum of 2*l.* 16*s.* 8*d.*; to the said defendant *E. Townsend*, her executors, &c. the like yearly rent or sum of 2*l.* 16*s.* 8*d.*; and to the said defendant *S. Townsend*, her executors, &c. the like yearly rent or sum of 2*l.* 16*s.* 8*d.*; the said several yearly rents to be payable and paid on the four most usual feasts or days of payment of rent in the year, that is to say, &c. The plaintiff then averred, that long before the time of the making of the said indenture of lease by the said *H. Skey*, *E. Townsend*, and *S. Townsend*, to the said plaintiff as aforesaid, the mayor and commonalty and citizens of the city of *London*, governors of the house of the poor, commonly called *Saint Burtholomew's Hospital*, near *West Smithfield*, *London*, of the foundation of King *Henry* the Eighth, were, and from thence hitherto have been, and still are, seised in their demesne, as of fee, of and in the said demised premises; and the said *H. Skey* and *S.* his wife, in right of the said *S.* and the said *E. Townsend*, and *S. Townsend*, were, at the time of the making the said demise,

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possessed of the said demised premises, with the appurtenances, for the rest, residue, and remainder of a certain term of ninety-nine years, commencing from and immediately after the feast of the Annunciation of the blessed *Virgin Mary*, in the year of our Lord 1760, and made and granted by the said governors to the said *H. Skey* and *S.* his wife, in right of the said *Susannah, E. and S.*, to hold the same to the said *H. S. and S.* his wife, in right of the said *S.*, and to the said *E. and S.*, from the feast of the Annunciation of the blessed *Virgin Mary*, in the year last aforesaid, for the said term of nine years; and that the said *H. Skey, E. Townsend, and S. Townsend*, at the time of the making of the said demise by them to the said plaintiff, had not, nor at any time since the making the said demise by them to the said plaintiff, had they, or had any of them, any other or further title or interest in or to the said demised premises, with the appurtenances, or any part thereof, than for the then residue or remainder of the said term of nine years, and therefore had not, nor could have, any right or title at the time of the making the said demise to the said plaintiff, to demise to him the said premises, or any part thereof, for any longer term than for the residue of the said term of nine years, at the time of the making of the said demise to the said plaintiff, to come and unexpired; and that the said term of nine years ended and expired by effluxion, lapse and course of time, on the 25th day of *March*, in the year of our Lord 1769; and that the said term of nine years, so ending and determining on the 25th day of *March*, in the said year of our Lord 1769 aforesaid, the said *S. Stephenson*, to whom the said plaintiff had so assigned the said demised premises as aforesaid, was thereupon on that day evicted out of and from the said demised premises, and obliged to surrender and deliver up the same; and thereupon the said governors afterwards, to wit, on the 9th day of *October*, 1770, at, &c. aforesaid,

demised to the said plaintiff the said premises, with the appurtenances, to hold the same to the said plaintiff, his executors, &c. from the feast day of the Annunciation of the blessed *Virgin Mary*, in the year of our Lord 1769, unto the full end and term of twenty-one years from thence next ensuing and fully ; by virtue of which said last mentioned demise the said plaintiff entered into the said demised messuage or tenement and premises, with the appurtenances, and became and was thereof possessed ; and thereupon the said *S. Stephenson* afterwards, to wit, in *Hilary Term*, in the 10th year of the reign of the now king, exhibited his bill of complaint against the said plaintiff, in his Majesty's Court of Exchequer at *Westminster*, to be restored to his possession of the said premises, and to obtain a satisfaction for the rents, issues, and profits of the said premises, received by the said plaintiff since the said surrender of the said premises by the said *S. S.* as aforesaid, and to compel the said plaintiff to assign the said premises to the said *S. S.* for the residue of the said term of eighteen years two calendar months and twenty-one days ; and the said plaintiff was thereupon afterwards, to wit, on the first day of *April*, in the year of our Lord 1772, at, &c. aforesaid, by virtue of a decree made in the said equity suit in the said Court of Exchequer at *Westminster*, obliged to pay to the said *S. S.* a large sum of money, to wit, &c., for the rents, issues, and profits of the said premises, received by the said plaintiff since the said 25th day of *March*, 1769, and to make a new demise of the said messuage or tenement and premises, with the appurtenances, to the said *S. S.*, from thence for the term of four years three quarters of a year two calendar months and twenty-one days, from the 29th day of *September*, 1771, at and under the yearly rent of *8l. 10s.* for the said four years and three quarters of a year, and at and under the rent of *2l. 2s. 6d.* for the said two calendar months and twenty-one days of the

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said term, being a much less rent than the said premises were then worth to be let; and also to pay to the said S. S. a large sum of money, to wit, the sum of 54*l.* 17*s.* 7*d.* as and for the said S. S.'s costs of suit in the said cause; and was also forced and obliged to lay out and expend, and did lay out and expend another large sum of money, to wit, 60*l.* in and about his defence in the said cause of suit in equity, contrary to the form and effect of the said indenture of lease so made by, &c.

Plea, *actio non*, because they say that the said S. S. was evicted out of and from the said demised premises by the said plaintiff, and this, &c.

Demurrer, and joinder in demurrer.

Morgan, for the plaintiff. The plea is bad; it is no answer to plaintiff's action. The eviction, as stated in the breach of the declaration, must necessarily be considered to be an eviction by recovery at law, by the elder title. Now none but the governors and company of the hospital could evict. Whatever is necessarily apparent on the face of a pleading, need not be averred. It would be impossible that any other party than the governors, or those claiming under them, could evict the plaintiff's assignee.

Davenport, contra. It does not appear by whom the plaintiff's assignee was evicted. Now the defendant's plea states, that it was by the plaintiff. This is clearly a good defence; for the plaintiff could not take advantage of his own tortious act. It cannot be intended, from the declaration, that the governors evicted him. The plaintiff's lease was a renewable lease. The plaintiff might have fraudulently got a renewal. He cited *Cro. Eliz.* 823. *Wynch.* 4. 1 *Mod.* 66.

The Court held the declaration bad, for want of

shewing by whom the plaintiff's assignee was evicted; or else it should have alleged a breach, that the lessor had no title to demise for so long a term; and that plaintiff was forced to lay out so much in procuring a better title from those entitled (a).

Judgment for defendant, with liberty for plaintiff to amend on payment of costs.

(a) In *Hob. 12. 11. Jac. Holder v. Thompson*, it was held, that though there was no expulsion, yet that covenant would lie on the word "demise," for want of title, which imported a covenant for good title; and that it was a breach for the lessor to take upon him to demise what he could not. But perhaps it might be otherwise if there were an express covenant for quiet enjoyment. In *Pomfret and Rycroft*, 1 *Sid. 21. Car. 11.* in covenant on demise for use of a pump, and breach that lessor had not repaired the pump, whereby lessee could not use it, three judges held the action lay, though there was no eviction; but *Twisden J.* thought otherwise, because on the word "demise," no action lies without eviction; and the judgment of the three was reversed in the Exchequer Chamber. 1 *Saund. S. C.* There *Twisden* says, that the not repairing was a non-feazance only, and not like lessor's stopping up a watercourse, or destroying a wood, in which lessor had granted *estovers*; and he there states also, that covenant does not lie but on an actual ouster.

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WILLETT and others, Assignees of Aram, a Bankrupt, against WILLIAM THOMAS and another.

1773.

Easter Term.

THIS was an action of trover brought by the plaintiffs, as assignees of *Aram*, a bankrupt, to which the defendants pleaded the general issue; and the cause was tried at the last assizes for *Gloucester*, and a verdict given for the plaintiffs, subject to the opinion of this court, on the following case: That *John Aram*, being an innkeeper at *Cowbridge*, in *Glamorganshire*, became indebted to the petitioning creditors in the

An innkeeper, as such, is not a trader, under the bankrupt laws; neither is an innkeeper, selling wine and brandy, and other liquors, by the dozen, to customers out of his inn, necessarily a trader (a).

(a) See 3 *Mod. 327.* Lord *Raym. 286.* 4 *Burr. 2064.* 2 *Wils. 382.* But if a victualler, or an innkeeper, deal in wine or liquors, as a distinct business, however small the quantities sold may be, they may be bankrupts. 3 *Wils. 146.* 1 *Temp. Rep. 572.* *Whitmarsh's Bkt. L. 10. Scoble*, that on the facts here stated, the jury might have found a trading.

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sum of 214*l.* 8*s.* 6*d.* That on the 24th of *September*, 1772, a commission of bankruptcy issued against him. That an assignment was duly made by the commissioners to the plaintiffs, previous to the commencement of their action. That on the 13th of *August*, 1771, the said *Aram* began to keep his house, to avoid and delay his creditors, before the levying the goods in question by the defendants; and that before and until the 13th of *August*, 1771, the said *Aram* kept an inn at *Cowbridge*, and used to sell wine, brandy, and other liquors, by the dozen, to customers out of his inn. That two gentlemen in *Cowbridge*, and others in the country, bought of him in that way, and that he sold wine, brandy, and other liquors out of his inn to every body that wanted it of him. That the main way of his getting his livelihood was as an innkeeper. The question for the opinion of the court is, whether, upon the facts above stated, *Aram* was or was not a trader within the meaning of the bankrupt laws.

The Court were of opinion that the facts stated did not constitute the plaintiff a trader within the bankrupt laws; and granted a new trial, because the jury should have found that he traded to such an extent as to deal otherwise than as an innkeeper.

Sent down to a new trial.

1773.

Trinity Term.

THACKER against **SHEPHERD** and others.

The payment
of money to
defendants' use
by a solvent
partner, out of

THIS is an action of trespass upon the case, brought by the plaintiff against the defendants. The action contained counts on work and labour, and money
his separate property, after the bankruptcy of his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. And where the plaintiff and the bankrupt, before the bankruptcy, being partnership brokers, effected an insurance for defendants, and the receipt of the premium was acknowledged in the policy at the time of effecting such insurance, but which was not in fact paid until after the plaintiff's partner's bankruptcy, by the plaintiff, out of his own separate property: the principal insured was held liable to the solvent partner only.

paid, laid out, and expended. The defendants pleaded the general issue, *non assumptit*. The cause came on to be tried at Guildhall, *London*, at the sitting after *Easter Term, 1773*, before Sir *William Henry Ashurst*, knight, one of the justices of this honourable court, when the jury found a verdict for the plaintiff for *£ 7s.* damages, and costs *40s.* subject to the opinion of the Court on the following case: That the plaintiff *Thacker* was partner with one *Rowley*, as insurance brokers. That upon the 3d of *April, 1771*, they caused an insurance to be made on the ship *Anna Maria*, belonging to the defendants, by their order, which policy was underwrote by *Robert Cornthwaite*, for *100*l.** and the premium acknowledged to be received in the usual way upon the policy. That the premium was not in fact paid, but credit was given to the brokers in the usual way till the settling day, which is usually soon after *Christmas*. That in *November, 1771*, *Rowley*, who carried on a considerable trade singly as a *Scotch* factor, became a bankrupt, and a separate commission issued against him. And in *September, 1772*, plaintiff paid the sum in question to Mr. *Cornthwaite*. And the question for the opinion of the court is, whether the plaintiff is entitled to maintain this action.

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Arden, for plaintiff. The objection taken to this action is, that no credit was given to the plaintiff only, but to the plaintiff and the bankrupt *Rowley*; and that the action should have been brought in the name of the plaintiff and the bankrupt's assignees. This action is well brought. The plaintiff, at the time of the payment, was a separate man. The money was not paid out of the joint fund. By the bankruptcy, the partnership between the plaintiff and *Rowley* was dissolved, and each were liable to pay the premium out of their separate funds. It would be strange indeed that an insolvent fund should be benefited by the arrangement

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made by the solvent partner, out of his own separate property. Though the original credit was given to the plaintiff and the bankrupt, yet, in conscience, the defendants were bound to pay in case of the failure of the brokers. It has been said, that the receipt of the premium on the policy was a discharge of the brokers and the defendants to the insurers; but that is only *prima facie*, and not conclusive evidence, of the payment. If *A.*, as the factor to *B.*, sells goods on credit, and dies insolvent, *B.* shall receive the money, and not the creditors of *A.* 2 *Str.* 1182.

Lee, contra. The demand is founded on a transaction by the plaintiff and his bankrupt partner. Credit was given to both the partners. When the receipt for the premium was given, it was considered as paid. They might immediately have brought their action for the payment against the defendants, and the production of the receipt would have been sufficient to have rendered the defendants liable. It is just the same as if the plaintiff and the bankrupt had paid the premium, and the insurers had lent them it again. A contrary construction would create great inconvenience. If the action had been brought properly, the defendants might have set off a debt due from the partnership. The remedy must follow the nature of the right. Credit was given to both the plaintiff and his bankrupt partner. It has been said, that if a joint action had been brought in equity, the present plaintiff would have been entitled to the money.

Arden, in reply. The only objection is to the form of the action. The plaintiff has paid the money out of his separate estate.

ET PER CURIUM. The action is for money paid by plaintiff, for defendant's use. The money was not

paid till a year after the bankruptcy of plaintiff's partner. It was not paid out of the partnership effects, but out of the separate estate of the plaintiff.

Judgment for plaintiff.

KING *against* GOUGH.

1773.

Mich. Term.

THE following was a case for the opinion of the Court. The cause was tried at *Exeter*, for the *Devonshire* assizes, in *August*, 1773, before Sir *K. Adams*, Knight, Baron, and the Honourable Sir *W. H. Ashurst*, Knight, Justice of the Court of King's Bench, when the jury found a verdict for the plaintiff, damages 9*d.*, costs 40*s.* subject to the opinion of the court. The declaration was for money had and received; and contained other common money counts. The defendant pleaded *non assumpsit*. The case was, that on the 7th *December*, 1772, plaintiff *King*, going on the *Lyme Regis* turnpike road, and passing through *Ronscombs Gurt* turnpike-gate, which stands upon the said road, with an empty cart, drawn by three horses, having the fellies of the wheels thereof of less breadth than nine inches from side to side, at the bottom or sole thereof, and going to a lime kiln in *Branscombe* parish, which is the next adjoining parish, being the nearest lime kiln to plaintiff's land, to fetch from thence a load of lime, in order to manure his land lying in the parish of *Honiton*, lime being there generally used as manure for land. The defendant, being the toll gatherer at that gate, duly appointed, and knowing the cart was going for the purpose aforesaid, did demand and receive of the plaintiff the sum of 9*d.*, sixpence whereof was for toll appointed by order of the trustees under the statute 31 *Geo. II.*, and 3*d.* the residue thereof, was for increased toll, claimed under the general act 7th *Geo. III.* And that the plaintiff went accord-

Under an exemption from toll, in an act of parliament for carts carrying compost, &c. or any thing whatever used in the manuring of land, the carriage of lime is not exempt. The words, "or anything whatsoever used in the manuring of land," were considered as only applying to the carriage of ploughs, harrows, and such like instruments.

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ingly the same day with the same carriage to the said lime kiln, loaded the said carriage with lime, and immediately carried the same lime, in the said cart, back through the same toll gate to his land aforesaid, and there laid the same on his land, for manuring the same. That the *Lime Regis* turnpike road consists of several branches, the tolls of all which are applied as a general fund for the repairing the whole. The greater number of carriages passing on this particular branch of the said turnpike road, are carts going for and returning loaded with lime, to be used in the manure of lands. That this action was commenced 6th *May* last. That the money was paid over by the toll gatherer to the treasurer before the action commenced, without the knowledge of the plaintiff. The question reserved for the opinion of the Court is, whether the plaintiff is entitled to recover in this action.

Mansfield, for plaintiff—Amongst other things, contended, that the plaintiff, by the words of the 31 *Geo.* II, was, under these circumstances, exempted from the payment of toll. The clause of exemption in that statute was, that “no person should be liable for any cart employed in the carriage of compost of any kind for the manuring of ground, or any thing whatsoever used in the manuring of land.” Now, even supposing that lime will not be included in the word “compost,” as I contend it is, yet the general words, “or any thing whatsoever used in manuring land,” will clearly exempt the plaintiff. The lime was used in manuring the land.

Buller, contra. Lime cannot be comprehended in the word “compost.” Compost means a composition of different things. Lime is no composition, no more so than salt. As to the other words, “or any thing used in manuring land,” they mean a carriage of some

tool or other, such as a plow, harrow, or the like. In several acts for other turnpikes, lime is mentioned by name. Here there is a reason why it should not be construed within the exemption, as it is the only thing the toll arises from, and the road could not be supported without it. Another objection is, that the money is paid over by defendant.

ET PER CURIAM. As the lime is not expressed, it cannot be included under the word "compost." It seems as if it were intended that lime should not be exempt from toll, as the road, perhaps, could not be supported without it.

Judgment for defendant.

RICHARDSON *against* ALLEN, *in Error*.

1774.

Hilary Term.

THIS was a writ of error from the Common Pleas, in which court judgment had been given for the defendant in error, on the following words: "He (meaning the defendant in error) has defrauded a mealman of a roan horse." The declaration did not allege any special damage.

"He has defrauded a mealman of a roan horse," are not actionable words, without special damage.

Lucas, for the plaintiff in error. The question is, whether this action is maintainable without special damage. I contend it is not; for though it is said the defendant in error defrauded another of a horse, yet it is not said that he did so criminally. It might be, that he had bought the horse and not paid for it. *Hard.* 8. 5 *Mod.* 398. *Hutt.* 13. *Raym.* 62. 1 *Show.* 181.

The Court held the words not actionable, as they were not laid as defrauding by false pretences, or any other criminal way.

Judgment reversed.

1774.

PARTHERICHE against MASON and another.*Mich. Term.*

The owner of a several fishery is, *prima facie*, the owner of the soil.

An act of parliament, authorising persons to repair and cleanse a navigable river, does not authorize them to make a passage to a new wharf on the river.

THIS was a special action on the case, commenced in *Michaelmas Term*, in the 13th year of the reign of the present king, 1772, wherein the plaintiff declared, that on the 1st day of *January*, 1764, and at the time of the grievances hereafter mentioned, he was, and yet is, seised, to wit, for the term of his natural life, of and in the sole and several fishery in a certain part of the river *Avon*, in the county of *Warwick*, which fishery is, and during the time aforesaid hath been, in the occupation of *Thomas Vincent*, as tenant thereof to the plaintiff; but that the defendants, intending to injure the plaintiff, and to diminish the value of his estate in the said fishery, whilst the said *Thomas Vincent* was possessed of the same, as tenant as aforesaid, *viz.* on 12th *June*, 1772, at *Old Stratford*, in the said county, did dig in the bed of that part of the said river which was and is the fishery of the plaintiff, and made divers large pits and trenches there, and there put great quantities of earth, stone, gravel, and rubbish, and thereby altered and damaged the bed of the said river in the said fishery of the plaintiff there, and continued the said pits and trenches so dug, and said earth, stone, gravel, and rubbish so there put, until the commencement of this action, whereby the said fishery of the plaintiff there is greatly injured, and his said estate therein diminished in value. That the plaintiff, on the 1st *January*, 1764, and at the time of the grievances hereafter mentioned, was, and yet is, seised (to wit), for the term of his natural life, of and in a certain close, called the river *Avon*, in *Old Stratford* aforesaid, which close is, and during all the time aforesaid hath been, in the occupation of the said *Thomas Vincent*, as tenant thereof to the plaintiff; but

the defendants, intending to injure the plaintiff, and to lessen the value of his said estate in the said close, whilst the said *Thomas Vincent* was possessed of the same as tenant as aforesaid, to wit, on the said 12th *June*, 1772, at *Old Stratford* aforesaid, did dig up a large quantity of the earth, soil, sand, and gravel in the said close, and converted the same to their own use, and made divers large pits, holes, and trenches there, and continued the same until the commencement of this action, whereby the said close of the plaintiff there is greatly injured, and his said estate lessened in value. —Last count. That the plaintiff, on the said 12th *June*, 1772, at *Old Stratford* aforesaid, was possessed of divers goods and chattels, to wit, 10,000 cart loads of earth, &c. as of his own property, and being so possessed, casually lost the same, which afterwards came to the hands of the defendants, who found the same, and have converted the same to their own use, to the plaintiff's damage of 500*l.* To which the defendants pleaded not guilty, and thereupon issue was joined.

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The cause came on to be tried at the assizes held for the county of *Warwick*, on the 24th day of *July*, 1773, when a verdict was found for the plaintiff on the first and second counts, damages 1*d.* each, costs, 40*s.*; and for the defendants, on the last count, subject to the opinion of the Court of King's Bench as to the verdict so found for the plaintiff on the first two counts, on the following case: It appeared in evidence, that the plaintiff is owner of the sole and separate fishery in the river *Aron*, in the place in question, and that his tenants have cut flags and osiers growing in the bed of the river, in a part of the said fishery, which river is there navigable, and the defendants are the proprietors of the navigation thereof. That about twelve months ago the defendants built a new wharf on their own ground, adjoining to the bed of the river in the

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place in question, to which wharf loaded barges could not come up, but at times when the river there was higher than usual. That in order to make it practicable for such barges to approach the said wharf at all times, the defendants dug a new canal in the bed of the river there, which channel was 138 feet long, and in some places, 19, and in others, 40 feet wide, and from 8 to 12 inches deep, and led to the said wharf; and that they took away some of the gravel and soil dug thereout, and converted it to their own use; that the navigation of the river there might have been carried on, as well as usual, without this new channel, which was cut for the sake of approaching the said new wharf. That there is an ancient wharf not far from the said place; but that it is an advantage to the public, and the town of *Stratford* in particular, to have this new wharf, and the approach thereto, as the price or rate of wharfrage would be diminished by having two wharfs instead of one. That since the passing of the act of the 24th *George* the 2d, c. 39, for the better regulating the navigation of the said river, another new wharf had been built by the side of the same river, at the distance of about twenty miles from the place in question, towards the river *Severn*, and a like channel cut to it, and no consideration for it was paid to the owner of the fishery in the last-mentioned place. That the plaintiff brought his action within six months after the facts in question were committed. The questions reserved for the opinion of the Court are, first, whether the bed and soil of the river *Avon*, in the place in question, being within a navigable part of the said river, as described in the said act of 24 *George* II, belong to the defendants, as proprietors of the navigation thereof, or to the plaintiff, as owner of the sole and separate fishery: second, whether the defendants, in making the new channel in question, as proprietors

of the said navigation, have acted within the powers and authority given them by the said act of parliament, and are justified thereby.

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Wallace, for plaintiff. As to the first question, he contended, that the plaintiff, being owner of the several fishery, must *prima facie* be owner of the soil. *Smith v. Kemp. Salk. 637.* 4 Mod. 186. *Carthew. 285, S.C. Bro. Tresp. pl. 426.* These authorities shew that a several fishery implies a right of soil. As to the second question, whether the owners of the navigation have not exceeded their authority, he observed, that the object of the act was to settle the tonnage. The defendants defended themselves under the clause by which they were to clear and repair the river in the same manner as heretofore. This act was done to make a passage to a new wharf, belonging to the proprietors of the navigation, and was not an act within the meaning of the statute.

Kenyon, contra. There is no reason why a person may not have a several fishery *in alieno solo*. If so, the fact should have been found, that plaintiff was owner of the soil. As to the second question, when persons are enabled to make a navigation, all incidental powers are given of making wharfs, &c. that may be necessary for more conveniently carrying it on. The defendants' acts in this instance were found, in the case, to be a benefit to the town. The restraint in the act of parliament, from making wharfs between *Evesham* and *Harrington*, seems to infer that the defendants might do it in other places. The act also gives the defendant liberty to land goods, &c. at any wharfs, as shall be thought convenient.

SED PER CURIAM. Where a man has a several fishery, the presumption is, that he has the soil; that

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presumption is conclusive, if not opposed. Here is a clear damage to the soil. The act gives no authority to the defendants to do what they have done. It only authorises to repair what the owners were formerly bound to do.

Judgment for plaintiff.

1775.

Mich. Term.

DEN on the Demise of WILLIAM GEERING against SHENTON, Widow.

A devise of lands to *S. S.* to hold the same unto *S. S.* and the heirs of his body, and their heirs for ever, chargeable with a legacy; but in case the said *S. S.* should die without leaving issue of his body, then a devise of the land unto *W. S.* to hold unto the said *W. S.* and his heirs for ever; also chargeable with such legacy; creates only an estate tail in *S. S.* with a vested remainder over.

THIS was an ejectment brought for the recovery of sixty acres of land, sixty acres of meadow, and sixty acres of pasture, with the appurtenances, in the parish of *Denchworth*, in the county of *Berks*, which *William Geering*, on the 24th *June*, 1774, demised to the plaintiff for five years, from the 25th *March* then last. And the cause came on to be tried at the last assizes at *Abingdon*, in the said county of *Berks*, when the plaintiff had a verdict, subject to the opinion of the Court on the following case: *William Geering* was seised in fee of the premises in question, and by his will of 28th *November*, 1738, devised the same in the following words: "I give and devise unto my grandson, *Samuel Shenton*, all that meadow ground, called *Picked Mead*, lying and being in the parish of *Denchworth*, in the county of *Berks*, to hold unto the said *Samuel Shenton*, and the heirs of his body, lawfully to be begotten, and their heirs for ever; chargeable, nevertheless, and charged with the payment of eight pounds a year unto my niece, *Mary Stevenson* the elder, during her natural life, to be paid her by quarterly payments; but in case the said *Samuel Shenton* shall die without leaving issue of his body; then I give and devise the said meadow ground unto my nephew, *William Geering*, son of *Mr. William Geering*, of

“ *Denchworth* aforesaid, to hold unto the said *William Geering* the son, and his heirs for ever, chargeable as aforesaid ; and also chargeable with, and subject to the payment of one hundred pounds of lawful money of *Great Britain* unto my niece, *Anne Beale*, within one year next after the said *William Geering*, or his heirs, shall be possessed of the said meadow ground. All the rest and residue of my goods, chattels, real and personal estates whatsoever, after the payments of debts, legacies, and funeral expences, I give, devise, and bequeath unto my grandson, *Samuel Shenton*, his heirs, executors, administrators, and assigns.” The said *William Geering*, the testator, died in 1739. The said *Samuel Shenton*, the grandson, entered and died seised, leaving issue *Samuel Shenton* the younger, his only child, who also entered and died seised. *Samuel Shenton*, the person last seised, attained twenty-one, and died in 1768, having made his will, dated 23d *April*, 1767, and thereby devised the premises to his mother, the defendant *Mary Shenton*, and her heirs and assigns for ever, who entered, and is now in the possession thereof, under the said devise. The lessor of the plaintiff is the nephew of the testator, *William Geering*, and son of *William Geering*, of *Denchworth*, in *Berkshire*, mentioned in the will of the testator *William Geering*. The question for the opinion of the Court is, whether the lessor of the plaintiff hath a good title to recover the lands devised, and in the ejectment mentioned.

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Baldwin, for plaintiff. Where an estate tail is once given, the issue of the devisee shall take no more. By the words of the will *Samuel Geering* took only estate tail. *King v. Melling*, 1 Vent. 225. *Langley v. Baldwin*, cited Eq. Cases Ab. 292. pl. 16. 559. pl. 15. *Doe ex dem. — v. Laming*, 2 Burrow. Repts.

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Forth v. Chapman, 1 *Peere Williams*, 663. This is a vested remainder over, with an estate tail. 1 *Vent.* 229.

Cooper, for defendant. The word "heirs" may be either words of purchase or limitation, according to the intention of the testator. Here they are words of purchase, superadded to the words of limitation. The heirs of the body took an estate in fee. The testator meant to give to the children of *Samuel* an estate in fee; he meant to give it over only on the contingency of his leaving no issue at his death. Here it appears, the word heirs of body meant only children; and the first taker took only an estate for life. But if he did give an estate tail to the first taker, he meant the devise over only on the contingency of his having no issue at his death. Because the nephew is to pay the legacy to his niece, that could not mean on an indefinite failure of issue.

Lord Mansfield. In the case of land, there is no instance where the words "not leaving issue" are confined to having issue at his death; but it would be otherwise of personalty, for the sake of intention, for that cannot take place but upon such a supposition. If it had rested on the words, "and their heirs for ever," there might have been a doubt. But the subsequent qualifying words make it plain, and restrain it to an estate tail, with a vested remainder over. As to the legacy, it is only in case the niece be alive when the event takes place. This can never be sufficient to make the estate to *Samuel Geering*, an estate for life only.

Postea delivered to plaintiff.

NEWMAN, *Esq. against* BAILEY, *Clerk,*

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Hilary Term.

DECLARATION in case, for slandering the plaintiff, as a justice of the peace, by saying he pocketed the fines, &c. of prisoners and others, in the way of his office. Plea *actio non*, because he says, that he the said plaintiff now is, and for divers, to wit, four years and more now last past, hath been one of the justices of our lord the now king, assigned to keep the peace of our lord the now king, in and for the county of *Somerset*, and during that time did, in his said office of such justice, convict divers and sundry persons respectively, in the said county of *Somerset*, in divers and sundry fines and sums of money, for or on pretence of their having respectively committed divers respective offences, against the form and effect of divers statutes of this realm respectively in such cases made and provided, which said respective fines and sums of money, amounting in the whole to a large sum, to wit, the sum of 50*l.*, he the said plaintiff had, long before the speaking and publishing of the said several words, received of the said respective delinquents, so by the said plaintiff respectively convicted; but the said plaintiff, at the time of the speaking and publishing of the said several words, had not paid the same to the several persons to whom the same ought to have been paid by virtue of the said respective statutes, but had kept and detained the same, contrary to the said respective statutes, for which reason the said *William*, at the said time, when, &c. did speak and publish of and concerning the said *Francis*, the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid; and this, &c. Demurrer for that the said defendant doth not, in said plea, alledge or show what persons, or whom

A plea, justifying slandering the plaintiff, as a justice of the peace, of pocketing fines of prisoners, whom the plaintiff had convicted, should state the names of the parties convicted, and of whom the plaintiff had received the fines (*a*).

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by name the said plaintiff hath convicted in his said office of justice, or in what fines or what sums of money, or for what offences, and when he hath convicted such persons, or what fines or sums of money he the said plaintiff hath received on that account, and when and from whom; and also for that the said plea is altogether insufficient, uncertain, and informal, &c. Joinder in demurrer. The court held the plea bad, for not stating the names of the parties whom the plaintiff convicted, or from whom he had received the fines.

Judgment for plaintiff.

1776.

MACKRELL against SIMOND, and another.

Trinity Term.

A charterparty, whereby the owners let a vessel to freight by the month, for such time as she should be taken up in performing a voyage from London to Plymouth, the island of Grenada, and from thence back to London, on the terms, that the owners should receive, and the freighters should load and unload a cargo at Grenada, on such outward and homeward voyage, is to be construed to mean as two distinct voyages from London to Grenada, and thence back to London, and not as one entire voyage; and the vessel having unladed a cargo at Grenada, and loaded another, but on her return to London was, with the cargo, entirely lost; it was held, the owners were entitled to freight for the voyage to Grenada.

DECLARATION on a charterparty, made the 9th March, 1774, between plaintiff, the owner, and defendants, whereby it is witnessed, *that the said owner had let, and the said merchants had hired and taken the said ship to freight, by the month, for such time as she should be taken up in performing a voyage from London to Plymouth, the island of Grenada, and from thence back to London, on the terms and conditions following (that is to say): first, the said owner for himself, his executors and administrators, did covenant, promise, and agree to and with the said freighters, their executors, administrators, and assigns, by the said charterparty, that the said ship then was, and during the said monthly employ, should, at the expence of him the said owner, be kept tight, staunch, and strong, and well manned, victualled, tackled, and provided, fit for merchants' service, and should, pursuant to the orders and directions of the said freighters, their factors or assigns, prosecute and perform the voyage above mentioned (the perils and dangers of the seas, and restraint of princes and rulers excepted), and should in such outward and homeward voyage load and unload all*

having unladed a cargo at Grenada, and loaded another, but on her return to London was, with the cargo, entirely lost; it was held, the owners were entitled to freight for the voyage to Grenada.

lawful goods and merchandizes as should be tendered, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, and furniture; and the said owner did also agree that his ship's company and boats should aid and assist in unloading and reloading the said ship's cargoes, as customary, at the island of *Grenada*; and that he the said owner should and would bear and pay all such port charges and pilotage as should accrue during the voyage and monthly employ aforesaid; in consideration whereof the said freighters, for themselves, their executors, and administrators, did covenant, promise, and agree, to and with the said owner, his executors, administrators, and assigns, by the said charterparty, that they the said freighters, their factors, or assigns, *should and would load and unload the said ship, and give the said master proper orders in respect thereof, in manner aforesaid*; and also that the said owner should not be chargeable with any expences of country freight, in respect of collecting and fetching the said ship's cargo at *Grenada*, other than the customary assistance of his boats and people as above mentioned; also that the said ship should be discharged out of her said monthly employ on the delivery of her homeward cargo at *London*, and also should and would well and truly pay, or cause to be paid, to the said owner, his executors, administrators, or assigns, in full, for the freight and hire of the said ship, at the rate of 110*l.* sterling per calendar month, for all such time as the said ship should be taken up in performing the voyage aforesaid, to commence and be accounted from the day of the date of the said charterparty, and to end and determine on the day of the discharge of her homeward cargo at *London*, and to be paid one third thereof on her report inwards, at the Custom House, *London*, and the remaining two-third parts thereof in two calendar months then next following, as by the said charterparty more fully appears; and the said plaintiff in

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fact saith, that the said ship in the said charterparty mentioned, after the making of the said charterparty (to wit) on the said 9th *March*, 1774, was tight, staunch, and strong, and well manned, victualled, tackled, and provided, fit for merchants' service; and the said defendants, in pursuance of the said charterparty, did, in the said river *Thames*, load on board the said ship divers goods and merchandizes, to be carried in the said ship from thence to *Plymouth*, and from thence to the island of *Grenada*, in the said charterparty mentioned, to be there unloaded and delivered to the said defendants, their factors or assigns; and the said ship afterwards, to wit, on the same day and year aforesaid, by the orders and directions of the said defendants, departed and set sail upon her said intended voyage from *London* to *Plymouth*, and the island of *Grenada*, with the said goods and merchandizes on board her, according to the form and effect of the said charterparty; and afterwards, to wit, on the 3d *April*, in the year aforesaid, arrived at *Plymouth*, and afterwards, to wit, on the same day and year last aforesaid, at *Plymouth* aforesaid, divers other goods and merchandizes were there loaded and put on board the said ship, by the factors and assigns of the said defendants, to be carried on board the said ship from *Plymouth* aforesaid to *Grenada* aforesaid; and the said ship afterwards, to wit, on the 13th *April*, in the year aforesaid, departed and set sail with all the said goods and merchandizes on board, from thence to *Grenada*, and afterwards, to wit, on the 18th *May*, 1774, arrived at *Grenada* with the said goods and merchandizes so loaden on board her as aforesaid, whercof the factors and assigns of the said defendants afterwards, to wit, on the same day and year last aforesaid, there had notice; and afterwards, to wit, on the same day and year last aforesaid, *the said goods and merchandizes were unladen, and delivered at Grenada aforesaid* to the factors and assigns of the said defendants, according to the form

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and effect of the said charterparty ; and the said plaintiff further saith, that afterwards, to wit, on the 9th *July*, in the year last aforesaid, at *Grenada* aforesaid, *divers other goods and merchandizes were laden and put on board the said ship* by the factor and agents of the said defendants, to be carried and conveyed in and on board the said ship from *Grenada* aforesaid to *London* aforesaid, in the said charterparty named, according to the form and effect of the said charterparty, to wit, at *Grenada* aforesaid ; and the said plaintiff further saith, that afterwards, to wit, on the 1st *August*, in the year aforesaid, the said ship, with the said goods and merchandizes on board her as aforesaid, departed and set sail from *Grenada* aforesaid towards *London* aforesaid, and that afterwards, and before the arrival of the said ship at *London* aforesaid, to wit, on the 9th *August*, in the year aforesaid, on the high seas, by and through the mere dangers of the seas, and by force of the winds and tempests, the said ship was wholly lost, together with the said goods and merchandizes so laden on board her as last aforesaid ; and the said plaintiff further saith, that from the day of the date of the said charterparty until the time of the loss and misfortune hereinafter mentioned, five calendar months elapsed and ran out, during which time the said ship was taken up in performing the said voyage in the said charterparty mentioned ; of all which said premises the said defendants afterwards, to wit, on the 1st *January*, 1775, at &c. aforesaid, had notice, and by reason thereof became liable to pay, and ought to have paid to the said plaintiff, the sum of 550*l.* being at the rate of 110*l.* sterling per month for the said time the said ship was so taken up as aforesaid ; yet, &c.

2d Count on the same charterparty, with the following averment : and said plaintiff saith, that the said ship in the said last mentioned charterparty mentioned,

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after making the said last mentioned charterparty, to wit, on the said 9th *March*, 1774, was tight, staunch, and strong, and well manned, victualled, tackled, and provided, fit for merchants' service; and the said defendants, in pursuance of the said last mentioned charterparty, did, in the said river *Thames*, load on board the said ship divers goods and merchandizes, to be carried in the said ship from thence to *Plymouth*, and from thence to the island of *Grenada*, in the said last mentioned charterparty mentioned, to be there unloaded and delivered to the said defendants, their factors or assigns; and the said ship afterwards, to wit, on the same day and year last aforesaid, by the orders and directions of the said defendants, departed and set sail upon her said intended voyage, from *London* to *Plymouth*, and the said island of *Grenada*, with the said goods and merchandizes on board her, according to the form and effect of the said charterparty, and afterwards, to wit, on the 3d day of *April*, in the year last aforesaid, arrived at *Plymouth* aforesaid, and afterwards, to wit, on the same day and year last aforesaid, divers other goods and merchandizes were there loaded and put on board the said ship by the factors and assigns of the said defendants, to be carried on board the said ship from *Plymouth* aforesaid to *Grenada* aforesaid; and the said ship afterwards, to wit, on the 13th day of *April*, in the year last aforesaid, departed and set sail with all the said goods and merchandizes on board, from thence to *Grenada* aforesaid, and afterwards, to wit, on the 11th *May*, 1774, arrived at *Grenada* with the said goods and merchandizes so laden on board her as aforesaid, whereof the factors of the said defendants afterwards, to wit, on the same day and year last aforesaid, had notice; and all the said goods and merchandizes so laden on board the said ship as aforesaid, afterwards, to wit, on the same day and year last mentioned, at *Grenada* afore-

said, were unladen and delivered to the factors and assigns of the said defendants, according to the form and effect of the said last mentioned charterparty; and the said plaintiff further saith, that afterwards, to wit, on the 9th day of *July*, in the year last aforesaid, at *Grenada* aforesaid, divers other goods and merchandizes were laden and put on board the said ship by the factors and agents of the said defendants, to be carried and conveyed in and on board the said ship, from *Grenada* aforesaid to *London* aforesaid, in the said charterparty named, according to the form and effect of the said charterparty, to wit, at *Grenada* aforesaid; and the said plaintiff further saith, that afterwards, to wit, on the 1st day of *August*, in the year aforesaid, the said ship, with the said goods and merchandizes on board her as aforesaid, departed and set sail from *Grenada* aforesaid towards *London* aforesaid; and that afterwards, and before the arrival of the said ship at *London* aforesaid, to wit, on the 9th day of *August*, in the year aforesaid, on the high seas, by and through the mere dangers of the seas, and by force of the winds and tempest, the said ship was wholly lost, together with the said goods and merchandizes so loaden on board her as last aforesaid; and the said plaintiff further says, that from the day of the date of the said last mentioned charterparty until the time of the arrival of the said ship at *Grenada*, three calendar months elapsed and ran out, during all which time the said ship was taken up in performing the said voyage to *Grenada* aforesaid; of all which said last mentioned premises the said defendants afterwards, to wit, on the said first day of *January*, in the year last aforesaid, at &c., afterwards had notice, and by reason thereof the said defendants became liable to pay, and ought to have paid, to the said plaintiffs, the sum of 330*l.* being at the rate of 110*l.* sterling per month, for the said time the said ship was so taken up

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 as last aforesaid ; yet, &c.
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The defendants demurred to both these counts, and the plaintiff joined in demurrer.

Buller, for defendant. The question in this case is, whether the plaintiff is entitled to any freight. It is a general rule, that the entire freight is not due till the vessel arrives and discharges her cargo at the port of delivery. This brings us to inquire, what was the port of delivery, and whether the charterparty contemplated that there should be only one voyage, or two. Now the words of the charterparty seem clearly to shew, that only one voyage was contemplated. The charterparty expresses the voyage to be for a voyage out and home; it does not say there shall be two voyages. The homeward bound cargo, is that from whence the merchant's chief profit arises. Supposing the ship had gone out in ballast, then the voyage would clearly have not ended until the ship had returned home. It may be said, that the freight was payable monthly; but that covenant relates only to the rate of payment, and not the time of payment. The payment is to be at the time of the report inwards, at the Custom House. *Bright v. Cowper, Brow.* 21.

Baldwin, for plaintiff. Freight is the mother of wages; and where the party receives benefit from the cargo, he is entitled to the freight. The owner discharged the cargo at *Grenada*, and the defendants have had the benefit of it. The plaintiff was bound to pay the seamen's wages at the first port of delivery. *Molloy*, 2 B. c. 4. This case goes to the time of payment. *Luke v. Lloyd*, 2 Burr. 882. *Maline*, 101. 1 Ld. Raym. 639.

Lord Mansfield. The judgment in this case must depend on the meaning of the charterparty. The charterparty puts no case but of a prosperous voyage out and home. Suppose the ship was cast away on the coast of *England*, and the goods saved; it would be admitted then that freight should be paid for the salvage *pro rata*. That is not provided for by the charterparty, but arises out of the equity of the case. Freight is the mother of wages, and the safety of the ship the mother of freight. It is a policy to tempt sailors to stick by the ship, where the ship goes out in ballast, so that the whole profit arises from the homeward bound voyage; and then it would be considered as one entire voyage. But nothing is so common as to have two voyages, one out and another home, and a profit on both—that is the case of East India voyages; where that is the case, if the ship performs one voyage, the freight is due for that, though she does not perform the other. Here there is an outward and homeward voyage, and the cargo was landed, and the merchant has derived a benefit.

Judgment for plaintiff on 2d count,
and for defendant on the 1st count.

FREEMAN *against* LINE.

THE following was a special case for the opinion of the Court, *viz.*: This was an action on the case, in which the plaintiff declared for money had and received, and on the other common counts. To which the defendant pleaded the general issue. Upon the trial of the cause, the jury found a verdict for the plaintiff, damages, 1s. costs, 40s. By a certain act of parliament, made in the 16th year of the reign of his majesty king *George III.*, intituled, an act to enlarge the term and powers of an act passed in the 5th year a certain act of parliament, intituled, &c." is too uncertain, and bad.

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A notice of action under an act of parliament against a tollgate-keeper, "for demanding and taking of me toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by

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against
LINE.

of his present majesty's reign, for repairing and widening the road from the great bridge in the *Borough of Warwick*, through *Southam* and *Darentry*, to the town of *Northampton*. It is enacted (amongst other clauses), that from and after the time of passing this present act, no exemption from the payment of toll at any or either of the gates already erected, or hereafter to be erected, on or near the said road, in pursuance of the said act of parliament, shall be allowed, (except as hereafter mentioned); and that all persons travelling the said road shall pay the respective tolls by the said act appointed to be paid, before they shall be permitted to pass through all, any, or either of the said gates, except such persons, and for and in respect of such matters and things, as are hereafter particular mentioned; that is to say; that no toll shall be demanded or taken for any cattle or carriage carrying or conveying stone, gravel, or other materials for repairing the said road, or any part thereof, or for repairing the highways of any parish, township, or place through which any part of the said road does lead; or carrying or conveying dung, mould, soil, or compost of any nature or kind whatsoever, (except lime), within any parish, township, or place through which the said road leads, for manuring of gardens or lands within any such parish, township, or place; or for hay, or corn in the straw, goss, or dead hedge wood, not sold or disposed of, but to be laid up in the houses, out-houses, barns, or back-sides of the respective inhabitants, landowners, or landholders in the several parishes, hamlets, or places where the same grew; nor shall any toll be demanded or taken for any ploughs, harrows, or other implements used in husbandry, or for any cattle for stocking of land within any parish, township, or place through which the said road doth lead, of the inhabitants, landowners, or landlords, within any such parish, township, or place. Provided always, and be it further en-

acted, that no action or suit shall be commenced or brought against any person or persons for any thing done in pursuance of this act, or the former act, until twenty-one days' notice shall be thereof given to the clerk of the said trustees, nor after a sufficient satisfaction, or tender thereof, hath been made to the party or parties aggrieved, nor after six calendar months next after the fact committed. The plaintiff is an inhabitant of the parish of *Daventry*, in the county of *Northampton*, through which town the road leads; and he occupies a considerable farm in the parish of *Staverton*, adjoining to the said parish of *Daventry*, through which the road also leads. On the said road a toll-gate is erected in the said parish of *Daventry*, through which the plaintiff's teams and cattle, &c. are obliged to pass for the manuring and stocking of his farm in the parish of *Staverton*. On the 4th of *May* last, the plaintiff's waggon, loaded with dung for the manuring his said farm in *Staverton*, passed through the said gate for that purpose. The defendant, as collector of the tolls, insisted upon, and received toll for the same; also afterwards, on the same day, he received toll for an empty waggon passing through from *Staverton* to *Daventry*, to fetch dung for the purpose aforesaid; and also afterwards on the same day, he received toll for two sheep and two lambs, and a cow, being cattle for stocking his land at *Staverton* aforesaid. The following notice, signed by the plaintiff, was served the 7th *May* last, on Mr. *Parry*, the clerk to the trustees of the said road: "Mr. *Parry*, this is to give you notice, that I do intend, at the expiration of twenty-one days from the date hereof, to commence and bring an action against *William Line*, as collector of the tolls at the turnpike or toll gate, erected on the road leading from the great bridge in the borough of *Warwick*, through *Southam* and *Daventry*, to

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FREEMAN
against
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“ the town of *Northampton*, at a certain place on the
 “ said road, in the parish of *Daventry*, called *Dray-*
 “ *ton Lane*, for demanding and taking of me toll
 “ for and in respect of certain matters and things par-
 “ ticularly mentioned, and exempted from the pay-
 “ ment of toll in and by a certain act of parliament,
 “ intitled, an act to enlarge the term and powers of an
 “ act passed in the 5th year of his present majesty’s
 “ reign, for repairing and widening the great bridge
 “ in the borough of *Warwick*, through *Southam* and
 “ *Daventry*, to the town of *Northampton*. Dated this
 “ 7th day of *May*, 1778. *J. Freeman.*”

The question is, whether the plaintiff is entitled to recover under the above circumstances

Daniel, for plaintiff. It is objected on the part of the defendant, that the notice of action given in this case was not sufficient within the meaning of the act of parliament. The notice is not by the act required to be in writing. It is sufficiently expressive.

The Court, however, held the notice too uncertain
 Judgment for defendant

1779.

PHILLIPS against FORDYCE, Esq

Mich. Term.

Under a bond,
 conditioned
 that if *F. M.*
 shall duly ac-
 count for all

DECLARATION in debt on bond, dated 16th
April, 1777, whereby the defendant became
 bound to plaintiff in the penal sum of 1000*l.* Plea,
 monies, &c. received by him in plaintiff’s service, as a clerk; and also that if the said *F. M.*
 shall embezzle, &c. plaintiff’s property, and shall, within three days after proof thereof,
 repay, &c. plaintiff the damage sustained by such misbehaviour or misdoing, or in default
 thereof, if the defendant shall, after notice given, make a full recompence to plaintiff, then
 the bond to be void. The plaintiff, in order to render the defendant (the surety) liable
 for *F. M.*’s not accounting, must give the defendant notice thereof; as by the construc-
 tion of the condition, the notice must be given for *F. M.*’s not accounting, as well as for
 his embezzling

praying *oyer* of the bond and condition; and it is read to him in these words: Whereas the above named *John Phillips* hath agreed to take into his service the above bound *Francis Marsh*, in his business of a brewer, upon the promise and undertaking of the above bounden *Samuel Hannay* and *E. Alex. Fordyce*, for the fidelity and good behaviour of the said *Francis Marsh*, as hereinafter mentioned: Now the condition of the above written obligation is such, that if the said *Francis Marsh* do and shall, from time to time, and at all times during his said service with the said *John Phillips*, well and truly account for, answer, and make good unto the said *John Phillips*, all such sum and sums of money, bills, bonds, notes, and other securities for monies, goods, and effects whatsoever, which shall come to his hands, custody, or power, belonging to the said *John Phillips*, or any other person or persons to whom he shall be answerable or accountable; and also that if the said *Francis Marsh* do and shall, at any time or times during such his said service, embezzle, purloin, waste or misapply, or detain any of the monies, bills, bonds, notes, or other securities for money, goods, or effects, belonging to the said *John Phillips*, or to any person or persons to whom he shall be answerable or accountable; then if the said *Francis Marsh* do and shall, within the space of three days next after proof of the fact, made by the oath or affirmation of one or more witness or witnesses, or the confession of the said *Francis Marsh*, repay, reimburse, and satisfy the said *John Phillips*, his executors or administrators, in good and lawful money of *Great Britain*, the damage which he or they shall suffer, sustain, or be put unto, by reason of such the misbehaviour or misdoing of the said *Francis Marsh*, and that as often as the case shall happen during the said *Francis Marsh's* service with the said *John Phillips*, or in default thereof, if the said *Samuel Hannay* and

1779.

PHILLIPS
against
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Alexander Fordyce, or either of them, or either of their heirs, executors, or administrators, do and shall, within one week after notice given to them, or left at their usual place of abode for the time being, make full recompence and satisfaction, in like lawful money, to the said *John Phillips*, his executors or administrators, for all such damages as aforesaid, then this obligation is to be void, or else to remain in full force and virtue. which being read and heard, the said *Alexander* saith, that the said *John* ought not to have or maintain his aforesaid action thereof against him, because he saith, that he the said *Alexander* hath performed and fulfilled the said condition of the said writing obligatory in all things on his part and behalf to be performed and fulfilled, and of this the said *Alexander* puts himself upon the country, &c., and the said *John* doth the like; and for further plea, the said *Alexander*, by the leave of the court here to him for this purpose granted, according to the form of the statute in that case lately made and provided, says that the said *John* ought not to have or maintain his aforesaid action thereof against him, because he saith that the said *Francis Marsh* did, from time to time, and at all times during his service with the said *John Phillips*, well and truly account for, answer, and make good unto the said *John Phillips*, all such sum and sums of money, bills, bonds, notes, and other securities for money, goods, and effects whatsoever, which did, during his said service with the said *John Phillips*, come to his hands, custody, or power, belonging to the said *John Phillips*, or any other person or persons to whom he was, during his said service with the said *John Phillips*, in anywise answerable or accountable, according to the form and effect of the said condition of the said writing obligatory; and the said *Alexander* further saith, that the said *Francis Marsh* did not, at any time or times during his said service with the said *John Phillips*, embezzle, purloin, waste,

misapply, or detain any of the monies, bills, bonds, notes, or other securities for money, goods, or effects, belonging to the said *John Phillips*, or to any person or persons to whom he was, during his service with the said *John Phillips*, in anywise answerable or accountable; and this, &c., wherefore, &c.

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Replication, *precludi non*, because he says, that the said *Francis Marsh*, after the making of the said writing obligatory, to wit, on the 24th April, 1777, at &c. aforesaid, entered and was received into the service of the said *John*, in the business of the said *John* of a brewer, and continued in the same service for a long space of time, to wit, from thence until and upon the 2d May, 1778; and that whilst the said *Francis Marsh* was, and continued in the service of the said *John*, to wit, on the 2d May, in the year last aforesaid, at &c. aforesaid, divers sums of money, amounting together to a large sum of money, to wit, the sum of two hundred and five pounds of lawful money of Great Britain, belonging to the said *John*, came to the hands and custody of the said *Francis*, and the said *Francis* afterwards, and whilst he continued in the service of the said *John*, to wit, on the said 2d May, in the year last aforesaid, at &c. aforesaid, was required by the said *John*, to answer and make good unto the said *John* the said money so come to the hands and custody of the said *Francis* as aforesaid, yet the said *Francis* did not answer and make good unto the said *John* the said money so come to the hands and custody of the said *Francis* as aforesaid, or any part thereof, but therein failed and made default, and the same still remains wholly unanswered and not made good to the said *John*; and this, &c.

Demurrer, and joinder in demurrer.

Cowper, for defendant The question is, whether

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three weeks notice should not have been given, under the words of the condition. The condition in substance is to be void, if *Francis Marsh* render an account, and does not embezzle. And the meaning of the condition is, that if *F. Marsh* is guilty of a nonfeazance, or a misfeazance in these respects, a notice must be given to the defendant, before he can be chargeable. A notice is necessary, whether *F. Marsh* neglect to account or embezzle the property of the plaintiff; and it is as much necessary in one case as the other. Here the plaintiff has not stated that he gave any notice.

Chambre, for plaintiff. The question is, whether the last words in the condition refer to the first part of the sentence (as to the accounting) or only as to the embezzling. The first is a nonfeazance; the second, to a misfeazance, in which case only the fact is to be proved by oath.

The Court were of opinion in favour of the defendant, that in either case, of not accounting, or embezzling, a previous notice ought to be given to the sureties.

Judgment for defendant; but plaintiff had leave to discontinue, on payment of costs.

DENN *against* TAYLOR.

1770.

Mch. Term.

AT the assizes held at *Bridgwater*, the 22d *August*, 1770, before *Willes* and *Ashurst*, justices, &c. A verdict was found for the plaintiff, damages 1s, costs 40s. subject to the opinion of his Majesty's court of King's Bench, upon the following case. That *Hannah Gibbes* was seised in her demesne as of fee, of and in one undivided twelfth part of a certain house, now used as a chapel for celebration of divine service, according to the rites of the Church of *England*, situate in the parish of *Walcott*, and which are the premises in the declaration mentioned; that the said *Hannah* being so seised, on the 16th *September*, 1762, duly made and published her last will and testament in writing, under her hand and seal, and thereby, amongst other things, gave unto Mrs. *Anne Parrott* the sum of four pounds yearly, to be paid out of the income of the said chapel, during her natural life, and to be paid her every half year while she lives; and moreover, "after all her just debts being paid, and the several legacies and annuities by her above given, she gave and bequeathed all the residue and remainder of her real and personal estate and effects (excepting what she might mention in a codicil) to her two nieces, Mrs. *Ann Taylor* and her niece *Eliz. Oliver*, to be equally divided." That the said will was duly executed in the presence of three credible witnesses, as the law requires. That the said *Ann Taylor*, in the will mentioned, is the wife of *John Taylor*, which said *John Taylor* and *Ann* his wife, are two of the defendants in this cause; and that the said *Eliz. Oliver*, in the said will mentioned, is the other defendant in this cause: that the said *Hannah Gibbes* afterwards, on the 25th *November*, 1762, made a codicil in writing to her said last will and testament, and

Where testatrix by will devised all her real property to *A. T.* and *E. O.* (except what she might mention in a codicil) meaning except what she shall mention in a valid codicil; and testatrix having made a codicil (which was void from being unattested) devising part of her real estate to other persons; it was held, that notwithstanding this, the whole of the real property passed to the devisees under the will, and not to the heirs at law.

1770.

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TAYLOR.

therein *she gives and bequeaths to her nephew John Taylor, all her interest and right in the chapel near me, paying the annuity out of it during Mrs. Parrott's natural life.* That the said *codicil* was signed by the said *Hannah*, but was not attested by any witness. That the said chapel in the said *codicil* mentioned, is the premises aforesaid now in question in this cause. That the said *Hannah*, being seised as aforesaid, afterwards, on the 27th October, 1763, departed this life without altering or revoking the said will and *codicil*, unmarried, and without issue, leaving *Elizabeth*, the wife of *Humphry Sibthorpe*, doctor of physic, and *Dionis*, the wife of *Thomas Llwyd*, clerk, her nieces and heirs at law, which said *Humphry Sibthorpe* and *Eliz.* his wife, and *Thomas Llwyd* and *Dionis* his wife, are the lessors of the plaintiff in this action. That the said defendants, upon the death of the said *Hannah Gibbes*, entered upon the premises, and held the same until that the said *Humphry* and *Elizabeth*, and *Thomas* and *Dionis* his wife, entered thereon on the first day of *January*, in the year 1764, and were thereof seised as the law requires, and so being seised, demised the same to the plaintiff as in the declaration stated. That by virtue thereof the plaintiff entered, and was thereof possessed, upon whom the defendants entered and ousted him from the premises. The question was, whether upon the said will and *codicil* the premises passed to the said defendants.

Hobhouse, for plaintiff. The premises in question did not pass to *Ann Taylor* and *Elizabeth Oliver*. They were not disposed of by the will, which only bequeathed all testatrix's real property, except all that she should mention in her *codicil*. The testatrix did not mean completely to dispose of all her real property to the devisees in the will. The will and *codicil* make only one complete disposition. A party can

only claim from the intention of the testator. This is a question between two persons, neither of whom have the testatrix's intention in their favour. The word "mention," made use of in the will, coupled with the subsequent intentional devise in the invalid codicil, clearly shew the testatrix's intention. A codicil, devising to a Roman Catholic, is a good revocation of a previous devise. *Vin. Ab. Devise. R. pl. 3.* It is not necessary here to call the codicil a revocation. The testatrix's intention may be altered by an unattested codicil.

The Court, however, thought the estate passed to the defendants, and gave

Judgment for defendants.

DOE on the Demise of WILCOCKSON against
LYNCH.

1770.

DENN
against
TAYLOR.

1771.

Mich. Term.

AT the trial of this cause, at the assizes held at *Nottingham*, in and for the county of *Nottingham*, on *Tuesday* the 25th day of *July*, 1771, it appeared in evidence, that *W. Wilcockson*, late father of the lessor of the plaintiff, was seised in fee of the premises in the declaration mentioned; and being so seised, by his last will, duly made and executed, devised the same to *Ann* his wife, until the lessor of the plaintiff should attain his age of twenty-one years; and after his said son should have attained his said age, then to him in fee; that the said testator died seised, leaving the said *Ann*, his widow, and the lessor of the plaintiff, his son and devisee; that the said *Ann* his widow demised the said premises to the defendant from year to year, under the yearly rent of 21*l.*, who commenced tenant at Christmas, 1763; that the lessor of the plaintiff attained his age of twenty-one years on the 8th *October*

A notice by the owner of premises, requiring a party in possession 'to leave the premises he then rented of the owner, at *Ladyday* next,' is not conclusive evidence of a demise from the testator to the party in possession.

1771.

DOE
on the Demise of
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LYNCH.

last, and that the defendant had continued in the possession of the said premises ever since that time; and that on the 2d day of *November* last a notice in writing, signed by the lessor of the plaintiff, was by his order delivered to the defendant, which notice is in the words and figures following:—" *London, Oct. 25th, 1770.—Mr. Daniel Lynch—Take notice, that you are to leave the house you now rent of me, in the parish of Newark, in the county of Nottingham, with the warehouse, stable, garden, and appurtenances thereto belonging, or in anywise appertaining, at Ladyday next, and thereof fail not at your peril. Given under my hand, this 25th day of Oct. 1770. James Wilcockson.*"—Whereupon it was insisted by the defendant's counsel, that the said notice was conclusive evidence, that the defendant was tenant to the plaintiff of the said premises, and not obliged by law to quit the possession thereof at the time mentioned in such notice; but there being no evidence of any demise, in fact, from the lessor of the plaintiff (who at the time he attained his age of twenty-one, resided in *London*, and who was only seventeen days more than twenty-one when he signed the notice; the lessor of the plaintiff wanting the house to carry on his own trade of a druggist and chemist, for which it was fitted, and had been used several years); unless such notice, signed and delivered as aforesaid, be conclusive evidence thereof, a verdict was, by the direction of the judge, given for the plaintiff, (but, at the pressing request of the defendant's counsel) subject to the opinion of the Court of King's Bench, whether such notice, signed by the lessor of the plaintiff, and delivered to the defendant as aforesaid, to quit possession of the premises mentioned in the declaration in this cause, was conclusive evidence that the lessor of the plaintiff, before the time such notice was delivered, had demised the same premises to the defendant, or

not; and if the court should be of opinion that such notice is conclusive evidence, that the lessor, of the plaintiff had so demised the premises to the defendant, then it was agreed that the verdict obtained in this cause should be vacated, and that the plaintiff should be nonsuited; but if the court (as the judge who tried the cause, and jury were,) should be of opinion, that the notice, signed by the lessor of the plaintiff, and delivered to the defendant as aforesaid, was not, under all the circumstances of the case, conclusive evidence that the lessor of the plaintiff had, before the time of such notice, demised the said premises to the defendant, then it was agreed that the *postea* should be delivered to the lessor of the plaintiff, with liberty for him to enter up judgment, and proceed thereon.

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Doe
on the Demise of
WILCOCKSON
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The Court thought the notice not conclusive evidence of the demise, and gave

Judgment for plaintiff.

WHITFIELD *against* WEEDON.

1772.

Trinity Term.

THE plaintiff declared, amongst other counts, as follows :—And whereas also the said *Henry Fotherley* afterwards, to wit, on the said 11th day of *October*, 1768, at &c. aforesaid, at the special instance and request of the said *Samuel*, demised to the said *Samuel* a certain other farm, called *Cashio Bridge Farm*, situate, lying, and being in the parish aforesaid, for a certain term and time then agreed upon by and between the said *Henry Fotherley* and the said *Samuel*, and which said term is since expired, he the said *Samuel*, in consideration thereof, afterwards, to defendant had a right to cut for repairing the fences; and that the plaintiff ought to have set out proper wood for the purpose of repairs, which plaintiff neglected to do, without averring any request on plaintiff so to do, or a custom of the country in this respect, is bad.

A plea (to a declaration against a tenant, for not using premises in husbandlike manner, in repairing fences, &c. on his implied promise so to do;) that the fences became out of repair by natural decay, and that there was not proper wood (without specifying it) which

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against
WEDDON.

wit, on the same day and year last aforesaid, at &c. aforesaid, undertook, and to the said *Henry Fotherley* then and there *faithfully* promised to use the said farm in a good and husband-like manner, during the time that he held the same as tenant thereof to the said *Henry Fotherley*; and also to yield and deliver up the same to the said *Henry Fotherley*, in good and husband-like condition, when he the said *Samuel* quitted and left the same; and the said *Henry Fotherley* in fact says, that the said *Samuel*, under and by virtue of the said last mentioned demise, held and enjoyed the said farm, with the appurtenances, for a long time, to wit, such part of the said land as was fallow until *Ladyday*, 1769, and the residue of the said farm, until the 10th day of *October*, in that year; and the said *Samuel*, at those respective times, quitted the said premises; yet the said *Samuel*, not regarding the said last mentioned promise and undertaking, so by him made as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Henry Fotherley* in this respect, did not use and leave the said farm, with the appurtenances, in a good and husband-like manner, according to the form and effect of his said last mentioned promise and undertaking, so made as aforesaid, but on the contrary thereof, he the said *Samuel*, during the time that he the said *Samuel* did occupy and enjoy the said farm, did permit and suffer the hedges, underwood, ditches, gates, stiles, rails, pails, and fences of and belonging to the said farm, to be greatly out of repair, and in bad condition, for want of new fencing, repairing, amending, scouring, and cleansing thereof, &c., and at the respective times in that behalf aforesaid, left the same out of repair, contrary, &c.

To this breach the defendant pleaded, that the said hedges, underwood, gates, stiles, rails, pales, and

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fences, above assigned to be out of repair and in bad condition, and to be broken down, ruinous, and in decay, severally and respectively grew and became so out of repair and in bad condition, and were broken down, ruinous, and in decay, by reason of age and length of time, and by unavoidable accidents, and without any wilful neglect or default in him the said *Samuel*, to wit, at the parish of *Rickmersworth* aforesaid; and that there was not, during the time when, &c., proper wood, or any other proper materials, on the said farm, which he the said *Samuel* had a right to cut or take for the making, maintaining, repairing, or supporting of such hedges, underwoods, gates, stiles, rails, pales, and fences, or any or either of them, or any part thereof, and that the said *Henry Fotherley* ought, during all the time when, &c. to have assigned, set out, or provided proper wood and materials for the making, maintaining, repairing, and supporting of the same respectively, to wit, at the parish of *Rickmersworth* aforesaid; nevertheless the said *Henry Fotherley* did not, nor would he assign, set out, or provide proper wood or other materials for that purpose, although he had due notice of all and singular the premises aforesaid, to wit, at the parish of *Rickmersworth* aforesaid, in the county aforesaid; and this, &c. wherefore, &c.

The plaintiff demurred to this plea as follows: that the said plea amounts to the general issue; and for that the said *Samuel*, in and by his said plea, hath attempted to put in issue, to be tried by a jury, a matter of right, that is, what sort of wood the said *Samuel* had a right to cut or take for the making, maintaining, and supporting of the said fences in the said plea mentioned; and for that the said *Samuel* hath not in his said plea set forth what sort of wood he the said *Samuel* had a right to cut or take for the purpose in the said plea mentioned; and for that he hath not in his said

1772.
 WHITEFIELD
 against
 WILSON.

plea set forth, that no such sort of wood was on the said premises, nor hath he set forth what the custom of the country is with respect to the making, maintaining, and supporting of the said fences in the said plea mentioned, or any custom relating thereto; and for that the said *Samuel* hath not set forth in his said plea, any request to the said *Henry Fotherley*, to assign proper wood for the purpose in the said plea mentioned; and for that the said plea is in other respects multifarious, defective, and informal, &c.

Joinder in demurrer.

Buller, for the plaintiff. The plea is bad, as it amounts to the general issue; and if the matters therein are true, they shew the plaintiff had no cause of action. The second objection to it is, that it does not shew what kind of wood was on the premises; it only states there was no proper wood which he had a right to take; it should have specified the sort of wood more particularly. Every tenant is bound to repair, and take proper wood, and he may take it without any assignment. *Lutw.* 1480. The plea is bad, as it amounts to a negative pregnant. *Cro. Jac.* 559. *Dy.* 95. The 3d objection is, that, supposing an assignment necessary, the defendant has not alleged any request to assign, which request would be necessary. The *onus* of repair is in the tenant. *Co. Lit.* 3, (a), as the plea is bad in substance.

Morgan, for defendant. The plea is not bad, for amounting to the general issue. It confesses the fact of the hedges, &c. being out of repair, but avoids it by proper excuse. The plea consists of matters of law and fact. He cited 2 *Ventris's Rep.* 295. 2 *Salk.* 344.

The Court thought the plea bad, for the cause assigned, and gave

Judgment for plaintiff.

The Master, Wardens, and Assistants of the Guild Fraternity, or Brotherhood of the most glorious and undivided Trinity, and of St. CLEMENT, in the Parish of DEPTFORD STROND, in the County of KENT, against STAPLES.

1777.

Easter Term.

THE plaintiffs and their predecessors are, and at the time of granting the several letters patent hereinafter mentioned were, and ever since have been, a body corporate and politic, and have enjoyed sundry grants, rights, liberties, privileges, and immunities, by force of divers charges and letters patent heretofore made to them by his majesty's predecessors, kings and queens of this realm, and particularly by grant or letters patent under the great seal of *Great Britain*, bearing date at *Westminster*, the 11th day of *June*, in the 30th year of the reign of Queen *Elizabeth*, reciting, that the said Queen's then Lord Great Admiral of *England*, had, by deed inrolled, surrendered to her the said Queen, the lastage and ballastage, and office of lastage and ballastage, of all ships and other vessels whatsoever, coming or being in or upon the river of *Thames*, or which should at any time thereafter become floating, issuing, passing, sailing, or going into or out of the river of the *Thames*, betwixt the city of *London* and the main sea, of what burthen soever such ships or vessels should be, and by what name or names soever such ballastage or lastage was or might be called or used, or which did, or thereafter should remain, lie, or be at, in, upon, or near unto any wharf, bank, or creek, near unto the said river, or any coast, shore, or part of the same, betwixt *London Bridge*, towards the west part, and the said main sea, towards the east; and all his lawful right, title, interest, and demand whatsoever, which he had, or might have,

The Trinity House have a right to the duty of ballastage of skreened garden gravel, though not taken from the *Thames*.
Qu. Whether gravel taken from the river *Lea*, is within the jurisdiction of the Trinity House.

1777

THE TRINITY
CORPORATION
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claim, or pretend to have, of, in, or to the premises, or any of them, by virtue of the said office of Great Admiral of *England*, or of the said Queen's letters patent, therein mentioned to bear date the 8th day of *July*, in the twenty-seventh year of her reign, made unto him of the said office of Great Admiral of *England*, or otherwise; and that he the said Lord Great Admiral of *England* had besought the said Queen to give and grant the premises unto the said master, wardens, and assistants, and the said late Queen *Elizabeth* did, by the said letters patent of the 11th day of *June*, in the thirty-sixth year of her reign, for sundry good reasons and considerations her thereunto moving, among other things, give, grant, and confirm, ratify and approve unto the said master, wardens, and their assistants, and their successors for ever, the lastage and ballastage, and office of lastage and ballastage, of all and all manner of ships and other vessels whatsoever, coming or being, or which thereafter at any time should be coming, floating, lying, or remaining, issuing, passing, sailing, or going in, upon, to, or out of the river of *Thames*, or elsewhere betwixt the bridge of the city of *London* and the main sea, or any wharf, bank, creek, coast, shore, or any part of the same, or near or adjoining thereunto, betwixt the bridge of *London*, towards the west part, and the main sea towards the east part, of what burthen soever such ship, vessel or vessels, was or should be, and by what other name or names soever, and in what kind or kinds soever such ballastage or lastage was or might be called, reputed, or known, exercised or used, to hold the said ballastage and lastage, and office of lastage and ballastage, and all other the premises by the last mentioned letters patent before mentioned, to be given, granted, ratified, and approved, with all fees, advantages, salaries, profits, emoluments, commodities, and rights, incidents, and appurtenances, to, for, out of,

or by reason of all or any the premises any way due, payable, accustomed, appertaining, or belonging unto the said master, wardens, and assistants, or their successors, for ever, by themselves, their substitutes, deputies, or assigns, to use, exercise, execute, and enjoy for ever; and to hold of the said Queen, her heirs and successors, as for the manor of *East Greenwich*, in the said county of *Kent*, in free and common socage. By other letters patent, bearing date at *Westminster*, the 24th day of *June*, in the seventeenth year of the reign of his late majesty King *Charles* the Second, reciting the said letters patent of the thirty-sixth year of the reign of her late majesty Queen *Elizabeth*; and further reciting, amongst other things, that many decayed seamen, their wives, widows, and orphans, had from time to time received good relief from the hands of the said master, wardens, and assistants, out of the lastage and ballastage raised and taken forth out of the said river of *Thames*, for ballasting of ships and other vessels, the said late King *Charles* the Second did, by the said last mentioned letters patent, give and grant unto the said master, wardens, and assistants, and to their successors for ever, the *lastage, ballastage, and ballasting or loading of sand, gravel, soil, stones, earth, chalk, rubbish, clay, flints, lime, soap, ashes, bricks, tiles, or any other things, merchandizes, or commodities whatsoever, taken from any wharf, creek, coast, bank, or shore upon or adjoining to the said river of Thames, for lastage and ballastage or loading, or used instead of such lastage, ballastage, or loading, with the office of lastage and ballastage, and ballasting of all such ships, hoys, boats, barks, and all other vessels whatsoever, coming or being, or which thereafter at any time should be coming, floating, lying, remaining, issuing, passing, sailing, or going in, upon, to, or out of the river of Thames, or elsewhere, betwixt the bridge of the city of London and the main sea, or any wharf, bank, creek,*

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coast, shore, or any part of the same, or near or adjoining thereto, betwixt the bridge of *London* aforesaid, towards the west part of the said main sea, towards the east part, of what burthen soever such ships or vessels should be, and by what other name or names soever, and in what-kind soever the said ballastage or lastage was or might be called, known, or used; and the said late King *Charles* did also by the said last mentioned letters patent grant unto the said master, wardens, and assistants, and their successors for ever, the gravel, sand, and soil of the said river of *Thames*, for the ballasting of ships and other vessels, and also full power and authority for themselves, or by their deputies, agents, workmen, and servants, from time to time, and at all times for ever thereafter, in all places whatsoever within the said river, being to the damage and annoyance of the same, at their wills and pleasures, to dig, take up, and raise, for the better furnishing of ships with ballast, the said gravel, sand, and soil out of the said river, as they should think fit, so as the said river might not be annoyed and made dangerous to ships, lighter boats, and other vessels therein passing; and the said gravel, sand, and soil, so by them taken up for the aforesaid use, to lay on shore, on any of the king's waste grounds (except as therein is mentioned), and every convenient place, and to take off the same as their occasion should require; and the said master, wardens, and assistants, and their successors, deputies, and assistants, solely to convert, use, dispose, and sell the said gravel, land, and soil of the said river, to hold the said ballastage and lastage, and office of ballastage and lastage, and the said gravel, sand, and soil of the said river thereby granted, with all fees, advantages, salaries, profits, rights, incidents, and appurtenances whatsoever, unto the said master, wardens, and assistants, and their successors for ever, by themselves, their substitutes, deputies, or assigns, to use, exercise,

execute, and enjoy for ever, for the use and benefit of the poor therein aforesaid, and no other; and the said master, wardens, and assistants thereby covenanted with the said king, his heirs and successors, that they the said master, wardens, and assistants, and their successors, should, by the best means and ways they could, provide and take care that the gravel, sand, and soil, by them to be taken out of the said river, should be raised and taken out from such shelves and places of the said river, as were or should be of danger to shipping, and for the better and more safety of the same; and they should, at their own charges, provide and have such number of lighters, great and small, as should be from time to time sufficient for the exporting and importing of the said ballast, as well to and for the said wharfs as unto all such ships, barks, or vessels, that should have use of the same, which said lighters should be justly gauged and marked, that the burthen and bigness might be known, to the end that all deceits between the buyers and sellers of the said gravel and sand, either in quantity or weight, might be prevented; and that they the said master, wardens, and assistants, and their successors, deputies, agents, and assigns, should, from time to time for ever thereafter, provide, utter, furnish, and sell the said gravel, sand, and soil, for the ballasting of all ships, barks, and vessels in the said river, that should have use thereof, at the rates and prices accustomed. An act of parliament was made and passed in the 6th year of the reign of King *George* the Second, intituled “An act for the better regulation of lastage and ballastage in the river *Thames*;” and such act was continued until the 24th day of *June*, 1782, and from thence until the end of the then next session of parliament. And another act of parliament was made and passed in the thirty-second year of the reign of his late majesty King *George* the Second, intituled “An act to continue,

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“ amend, explain, and render more effectual an act
 “ made in the sixth year of his said late majesty’s
 “ reign, for the better regulating of lastage and bal-
 “ lastage in the river *Thames*, and to prevent putting
 “ of rubbish, ashes, dirt, or soil into said river, and in
 “ the streets, passages, and kennels in *London*, and in
 “ the suburbs thereof, in *Middlesex* and in *Westminster*,
 “ and such part of the Duchy of *Lancaster* as is in
 “ *Middlesex*, and for allowing a certain quantity of
 “ dung, compost, earth, or soil, to be yearly shipped
 “ as ballast, from the Laystalls in *London*, on board
 “ any collier or coasting vessel;” which act was con-
 tinued until the 24th day of *June*, 1770, and from
 thence until the end of the then next session of par-
 liament. That defendant *John Staples* did, on the
 10th day of *August*, 1770, ship on board the ship or
 vessel, called the *Diana*, of the burthen of about 150
 tons, whereof one *Riche* was then the commander, and
 then lying in the river of *Thames*, betwixt the bridge
 of the city of *London* and the main sea, and bound on
 a voyage to *Leith*, in *Scotland*, 20 tons of screened
 or garden gravel, in order to be carried, and which
 were accordingly carried therein to *Leith* aforesaid.
 The defendant *John Staples* did, on the 8th *September*,
 1770, also ship on board the ship or vessel, called the
Polly, of the burthen of 300 tons, or thereabouts,
 whereof the said *James Legge* was the commander,
 then lying in the river of *Thames*, within the limits
 aforesaid, and bound on a voyage to *St. Petersburg*,
 in *Russia*, 40 tons of screened or garden ground, in
 order to be carried, and which were accordingly car-
 ried in the last mentioned ship, in her said then in-
 tended voyage to *St. Petersburg*, both of which said
 quantities or parcels of gravel so shipped by the said
 defendant on board the said two ships, were taken from
 the new cut of the river *Lea*, between *Limehouse* and
Bow, for sale, and entered the same at the Custom

House, and the same was used as ballast, and the whole of both the said quantities or parcels of ground were so shipped and put on board, without any licence or authority from the plaintiffs, and without any application being made for any such licence or authority, and without any thing being paid or offered, or tendered to be paid by the defendant, to or for the use of the plaintiffs, for or in respect of the said several parcels or quantities of gravel so shipped as aforesaid, or either of them, or of any part of either of them. This cause came on to be heard before the Lord High Chancellor, who was pleased to order that a case should be made for the opinion of the judges of the Court of King's Bench, and that the question on such case should be, whether the defendant was intitled to ship on board such ships or vessels the said screened or ground gravel, without paying the plaintiffs any thing for the same, or having a licence from the plaintiffs for that purpose.

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Cooper, for plaintiff. There are two questions in this case; 1st, whether gravel taken from the river *Lea* is within the jurisdiction of Trinity House; 2dly, whether skreened garden gravel is merchandize within the meaning of the proviso in the letters patent of 12 *Charles II.* As to the first question, it is to be observed, that there were two objects, viz. that the Trinity House should have all the benefit of ballast got out of the River, and that they should raise a fund, &c. It was intended, that for every thing which goes from the port of *London*, as ballast, there should be paid a duty to the Trinity House. In the case of the *Trinity House v. Bowater* (Exch.), 1712, the court declared that the whole right of ballasting ships in the port of *London*, belonged to the Trinity House. He cited *The Trinity House v. Hodges*, 27th April, 1716,

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in Chancery; *Same v. Ryall*, 1275, in Chancery, affirmed in the House of Lords, 4th Feb. 1776. As to the 2nd question, whether this gravel was to be considered merchandizable: it certainly must be so considered, as from the case it appears it was shipped for sale.

Buller, for defendant. The charters are controlled by the subsequent statutes. But even if the 1st question stood upon the charters alone, this gravel, taken from the river *Lea*, could not be considered as belonging to the Trinity House. All the cases stated are of ballast taken out of the *Thames*, or from some wharf upon the river *Thames*. The words of the charter of *Charles II.* are, “taken from any wharf, creek, &c. “upon or adjoining to the *Thames*.” This gravel was taken from the river *Lea*, which is no creek of the *Thames*, and is not a river which runs through many counties. The charter means something that, at high water, is covered with the water of the *Thames*. As to the 2d question, whether within the proviso, the defendant is only to pay for ballastage to the amount of 40 tons (all above that being free); he only paid 3s 6d. for this, whereas if it could be considered as merchandize, he would have had to pay at the Custom House 4s.

The Court did not decide upon the first question; but upon the second point, were all clear in favour of the plaintiff, *viz.* that upon the facts stated, skreened garden gravel was to be considered as merchandize.

Judgment for plaintiff.

MAY *against* HOUSE *and* Wife.

1781.

Easter Term.

THE plaintiff declared on counts for money lent to the wife before marriage, and on promises by her before marriage, and also on promises by the husband during marriage. The defendants demurred generally to the whole declaration, and plaintiff joined in demurrer.

A misjoinder of action against husband and wife, may be taken advantage of by general demurrer (a).

Bower, for defendant. This is a misjoinder of action. The husband and wife cannot be jointly sued on a demand due from the husband alone; and this is bad on general demurrer.

Baldwin, contra. This defect cannot be taken advantage of by a general demurrer. I agree that it might in arrest of judgment; but before judgment, we might have taken damages on the good counts only. Perhaps in special demurrer the objection would hold.

SED PER CURIAM. The defect is a defect in substance, and may be taken advantage of on general demurrer.

Judgment for defendant; but plaintiff amended by withdrawing the bad counts.

(a) See 1 *Taunt.* 212.

TURNER, *Esq. against* M'NAMARA, *Esq. Executor of* M'NAMARA.

1781.

Easter Term.

DECLARATION in debt on bond given by the testator to the plaintiff and others, whom plaintiff hath survived. Plea (after craving oyer of bond, for the payment of 3000*l.*), that all the sums of money which became due on the bond were paid, may be replied to generally, by a general denial of the words of the plea, without assigning any specific breach (b).

A plea (to a declaration on bond, conditioned amongst other things,

(b) See 8 T. R. 459, 460. 1 *Bos. & Pul.* 640, 641. 2 *New Rep.* 176, 177. 3 *East*, 405. 6 *East*, 507. 1 *Saund.* 101. 2 *Saund.* 410. 3 *Wils.* 385. 1 *Marsh.* 95. 5 *Taunt.* 386. 6 *Taunt.* 47.

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which, amongst other things, was for the payment of 3000*l.* and interest, by one *Samuel Lynch*, unto the obligees, at their house in *Mincing Lane, London*, or at such other place where they should reside), that the said *Samuel Lynch* hath well and truly paid, or caused to be paid, to the said *Samuel Turner* the elder, *Thomas Turner*, and *Samuel Turner* the younger, or one of them, their or one of their executors or administrators, at their house in *Mincing Lane*, in the city of *London*, or at such other place where they did then reside in *London*, all sums of money which became due from the said *Samuel Lynch* to the said *Samuel Turner* the elder, *Thomas Turner*, and *Sam. Turner* the younger, under, by virtue, and according to the terms of the said articles of agreement, to wit, at *London* aforesaid, in the parish and ward aforesaid; and this, &c. Replication, that the said *Sam. Lynch*, in that plea mentioned, did not pay to the said *Sam. Turner* the elder, *Thomas Turner*, *Sam. Turner* the younger, or to either of them, or to their executors or administrators, all sums of money which became due from the said *Sam. Lynch* to the said *Sam. Turner* the elder, *Thomas Turner*, and *Sam. Turner* the younger, under, by virtue, and according to the tenor of the said articles of agreement in that plea mentioned, in manner and form as the said *John M'Namara* hath above in that plea alleged; and this the said *Samuel Turner* the younger prays may be inquired of by the country. Demurrer, for that the said *Sam. Turner* the younger hath not, in or by his said replication, assigned any specific breach, by the nonpayment of any specific sum of money of the said principal sum of 3000*l.* with the interest for the same, according to the tenor of the said articles of agreement, or when the same became due, contrary to the form and effect of the said above recited indenture; and also, for that the said *Sam. Turner* the younger, hath not, in and by his said replication,

assigned any sufficient breach, by reason whereof the said sum of 6000*l.*, in the said writing obligatory mentioned, could be forfeited, and become due and payable to the said *Sam. Turner* the younger, by reason of a breach of the condition thereof; and also for that it does not appear in and by the said replication of the said *Sam. Turner* the younger, that he has any legal cause of action against the said *John*, upon the said writing obligatory in the said declaration mentioned; and also for that the said replication is in other respects insufficient in law, multifarious, complicated, double, and informal, &c.

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Joinder in demurrer.

Lane, for defendant. The plaintiff, in his replication, has assigned no breach which would entitle him to judgment. There is no specific breach assigned, which is necessary when the plea states a general performance. He cited *Jones v. Williams*, Dougl. 214 (a).

Baldwin, contra. This bond was given to secure the sum of 3000*l.* Defendant says, *S. Lynch* did pay all the money that became due on the bond; and plaintiff says he did not. This is a perfect issue. There was no other sum to be paid than the 3000*l.*

ET PER CURIAM. There is only one sum to be paid; and this is not like the case cited, where various sums might be received. Therefore the issue is certain enough. The plea can only mean, that *S. Lynch* paid the 3000*l.* and the plaintiff negatives it.

Judgment for plaintiff.

(a) This case is not considered as law. See 8 Term Rep. 463, 4.

A covenant by a party, that so long as defendant should continue and be in the actual receipt of the profits of a rectory, she would pay a yearly sum during the life of the rector, by two half yearly payments, must be construed as a covenant for the payment of such yearly sum whilst the covenantor is in receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits.

DECLARATION, that by a certain indenture *tripartite*, made on the 30th *February*, 1782, at &c. between the said *Eliz. Jones*, of the first part, and one *Capel Berrow*, rector of *Rossington*, in the county of *Nottingham* and *York*, of the second part, and the said *Edmond Combe*, of the third part; one part of which said indenture, sealed with the seal of the said *Eliz. Jones*, he the said *Edmond Combe* now brings here into court, bearing date, &c. reciting that in or about the Term of *St. Hilary*, 1774, the said *Eliz. Jones* obtained a judgment in his majesty's Court of King's Bench, at *Westminster*, against the said *Capel Berrow*, for the sum of 1,200*l.* together with costs, by virtue whereof the said *Eliz. Jones* obtained a sequestration of the profits of the said rectory of *Rossington*, and was then in the receipt thereof, of the yearly value of 210*l.* clear of all reprisals, and there was a considerable sum of money due, owing from the said *Capel Berrow* unto the said *E. Jones*; and reciting that the said *E. Jones* was intitled to an annuity of 70*l.* during the life of the said *Capel Berrow*, payable out of the said profits of the said rectory; and the said *Capel Berrow* was, and stood indebted unto the said *Edmond Combe*, as of the last will and testament of the said *Vincent Phipps*, in a considerable sum of money; and the said *Vincent Phipps* did, in his lifetime, obtain a judgment of outlawry against the said *Capel Berrow*; and some disputes had arisen between the said *E. Jones* and the said *Edmond Combe*, touching their respective demands on the said *Capel Berrow*, and their right to the benefit of the said sequestration, and unto the profits of the said rectory; and a suit had been instituted in his

majesty's Court of Exchequer, by the said *Edmond Combe*, against the said *Eliz. Jones* and *Capel Berrow*, and divers proceedings had thereon; in order to put an end to such disputes, it had been agreed between all the parties to the said indenture, at the time of making thereof, that the said *Eliz. Jones* should continue in possession of the profits of the said rectory during the life of the said *Capel Berrow*, for the purpose of keeping down the arrears of the said annuity; and after payment thereof, to pay unto the said *Edmond Combe* the sum of 70*l.* per annum, for and on account of the said debt so due from the said *Capel Berrow* unto the said *Edmond Combe*, together with his costs thereafter mentioned; and after payment thereof, to retain the residue of the said profits on account of the debt so due and owing to her from the said *Capel Berrow* as aforesaid: and further reciting, that the said *Eliz. Jones* had agreed on the execution of the said indenture to pay unto the said *Edmond Combe* the sum of 50*l.* on account of the said debt so due from the said *Capel Berrow* to the said *Edmond Combe* as aforesaid, and had also agreed to enter into a covenant for payment of the said sum of 70*l.* to the said *Edmond Combe*, during so long time as she, or any one for her use or to her benefit, should continue in possession of the said profits of the said rectory: and further reciting, that the said *Capel Berrow* had, at the instance and request of the said *Edmond Combe*, on the day of the date of the said indenture, executed an assignment of two policies, bearing date respectively the 15th day of *March*, 1749, and the 24th *June*, 1756, under the seal of the Amicable Society for a Perpetual Assurance Office, whereby the said society obliged themselves to pay unto the said *Capel Berrow*, or his assigns, such a proportion or share of the joint stock and fund of the said society as should become due to the said *Capel Berrow* at such time as therein men-

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tioned. In consideration of which promises the said *Edmond Combe* had agreed that the said outlawry should be reversed, and that he would enter into a covenant not to molest or hinder the said *Eliz. Jones* from receiving the profits of the said rectory, until default should be made in payment of the sum of 70*l.* per annum; and also that he would not proceed any farther on the said bill in equity; and the said *Eliz. Jones*, for and in consideration of the covenant contained, on the part of the said *Edmond Combe*, his executors and administrators, did thereby for herself, her heirs, executors, and administrators, covenant, promise, and agree to and with the said *Edmond Combe*, his executors, administrators, and assigns, that she the said *Eliz. Jones*, her executors and administrators, should and would, *so long as she or they should continue and be in the actual receipt of the profits of the said rectory of Rossington*, under the said sequestration, or any other sequestration then to be obtained thereof, or by any other ways or means whatever, well and truly pay or cause to be paid, unto the said *Edmond Combe*, his executors, administrators, or assigns, yearly and every year, *during the life of the said Capel Berrow*, the full sum of 70*l.* of lawful money of *Great Britain*, free and clear of all deductions whatsoever, *by two even half yearly portions, on the thirtieth day of January and the thirtieth day of July*, in every year, at the Hall of *New Inn*, in the county of *Middlesex*; the first payment thereof was to begin and be made on the 30th day of *July* then next ensuing the date of the said indenture; provided nevertheless, and it was by the said indenture agreed between the said parties, that in case any loss should be sustained by reason of the failure of any of the tenants or farmers of the said profits of the said rectory, without the wilful default of the said *Eliz. Jones*, or in case the rent of the said profits of the said rectory should, at any time thereafter, not by the de-

fault or design of the said *Eliz. Jones*, her executors or administrators, be lowered, then and in either of the said cases, a reasonable proportion of the loss occasioned by such tenant, by reason of the fall of such rent, should be deducted out of the said annual sum of of 70*l.*, as by the said indenture, amongst other things, more fully and at large appears: and the said *Edmond Combe* further says, that although from the time of making the said indenture hitherto he hath well and truly performed, fulfilled, and kept all and singular the covenants and agreements in the said indenture contained, on the part and behalf of the said *Edmond Combe* to be performed, fulfilled, and kept, according to the form and effect of the said indenture; yet protesting that the said *Eliz. Jones* hath not performed, fulfilled, or kept any thing in the said indenture contained on her part and behalf to be performed, fulfilled, and kept; the said *Edmond Combe*, in fact, further says, that the said *Capel Berrow*, on the 29th *September*, 1782, at &c. was alive, and was then rector of the said parish of *Rossington*, and that the said *Eliz. Jones*, on the said 13th *February*, 1782, at &c. and from thence to and until the said 29th *September*, 1782, was in the actual receipt of the profits of the said rectory of *Rossington*, under a sequestration thereof, and in fact received much more, to wit, 60*l.* more than sufficient to pay all and every the sums agreed to be paid by the said indenture brought here into court; and that during the said term no loss was sustained by reason of the failure of any of the tenants or farmers of the said rectory, nor any lowering of the rent of the same during the said term, but on the contrary thereof, the tenants and farmers thereof were solvent, and paid her the whole of the rent mentioned in the said indenture, and she had enough to pay the said *Edmond Combe* the sum of 35*l.* on the 30th *January*, 1783, over and above all and every sum to be paid by

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the said indenture; and that on the 30th *January*, 1783, the sum of 35*l.*, part of the said 70*l.*, became due and in arrear from the said *Eliz. Jones* to the said *Edmond Combe*, executor as aforesaid, and still remains in arrear and unpaid by the said *Eliz. Jones* to the said *Edmond Combe*, executor as aforesaid, contrary, &c.

Plea, that the said *Capel Berrow*, long before the said 30th *January*, 1783, when the said sum of 35*l.* is, by the said declaration, supposed to become due, to wit, on the 5th of *October*, 1782, to wit, ~~an~~ &c. died; and this, &c.

Demurrer, for that it appears by the said declaration and plea, that the said *Elizabeth* had received the profits of the said rectory, up to the death of the said *Capel Berrow*, sufficient to satisfy the said *Edmond* his demand, though by the said indenture it was to be paid to him at a future day, but before the commencement of this suit; and for that the said plea is also only argumentative, impertinent, and does not deny any fact alleged in the declaration; neither does it admit the facts asserted in the said declaration, or allege any fact in excuse or justification for the nonpayment of the money thereby demanded.

Joinder in demurrer.

Cooper, for plaintiff. The words of the covenant are, that the defendant will pay the money "so long as she should continue and be in the actual receipt of the profits of the rectory;" and though it is afterwards said, that it shall be paid during the life of the rector, yet these words are mere surplusage, and may be rejected without altering the real intention of the parties. For here the continuance of the defendant in the receipt of the rents and profits, is the ground of her

being liable. Now it appears from the pleadings that she has received that out of which the profits are to be paid, and she is therefore liable, though the day of payment had not arrived at the death of the rector.

The Court however were clearly of opinion against the plaintiff, and gave

Judgment for defendant.

OLHSEN *against* DRUMMOND.

DECLARATION in covenant, that whereas by a certain charterparty of affreightment, indented and made the 12th April, 1782, to wit, at &c. between the said Plaintiff, by the description of *Jurgen Ohlsen*, master of the good Russian ship the *Stadt Riga*, of the burthen of 400 tons measurement, or thereabouts, now lying at *Plymouth*, and bound on a voyage outward to the island of *Teneriffe*, and from thence to the island of *St. Thomas*, in the *West Indies*, of the one part; and the said Defendant, by the name and description of *James Drummond*, of *London*, gent. acting herein in the names of, and undertaking for *W. Herries*, *G. Keith*, and Company, of &c., merchants and burghers, subjects of his imperial majesty, of the other part; one part of which said charterparty, sealed with the seal of the said D., the said P. now brings here into court, the date whereof is the same day and year aforesaid, it was witnessed, that the said P. did grant and to freight let, unto the said *W. Herries*, *G. Keith*, and Co. the said ship or vessel, called the *Stadt Riga*, for the voyage, and upon the conditions thereafter mentioned; and the said P. for himself, his heirs, executors, and administrators, did thereby covenant, promise, and agree to and with the said D., his executors,

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Trinity Term.

The discharge of an outward bound cargo at a particular place, is not in general a condition precedent to the providing a return cargo (a).

A freighter, who covenants to load a return cargo, must, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and must not by any act take to the ship.

(a) See 3 *Chitty's Commercial Law*, 391. 3 *M. & S.* 308. 8 *Taunt.* 576.

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administrators, and assigns, that the said ship, having unloaded her outward bound cargo at the said island of *St. Thomas*, and being in a fit and proper condition for her voyage thereafter described, should directly sail for, and proceed to the island of *Dominica*, in the *West Indies*, and there, at either or both of the ports of *Rousseau* and *Prince Rupert's Bay*, or at either of the islands of *Grenada* or *St. Christopher's*, as the freighters should direct, load, take, and receive on board from the said freighters, or their assigns, such a full and complete homeward bound cargo of sugar, coffee, cotton, and other produce, as the said ship could reasonably stow and carry in her (that is to say) three tiers of sugar in her hold, one tier of sugars in the tween-deck, with a proportion of small casks for the benefit of stowage, and the remainder of her cargo in coffee and cotton, not exceeding 40 bags of the latter, of 448lbs. weight each; that the said ship, being so loaded and dispatched, should, with due expedition, sail for and proceed to the port of *Ostend*, or that of *Bruges*, or as near thereto as she could safely go, and there, according to orders, unload and deliver to the said freighters, their agents, correspondents, or assigns, her said homeward bound cargo, agreeable to the bills of loading that should have been given for the same, and on such delivery end her voyage (the perils and dangers of the seas, and restraints of princes and rulers and others always excepted); that the said ship should lie at her loading ports ninety running days, if required, to receive her cargo, and at *Ostend* thirty running days to discharge the same, to begin respectively on her being ready to receive or deliver goods; and that in the loading and discharging of the said homeward bound cargo, the said ship, her boats, and her crew, should give all customary assistance to the said freighters; in consideration whereof, the said D. acting as aforesaid, did thereby for himself, his

heirs, executors, and administrators, covenant, promise, and agree to and with the said P., his executors, administrators, and assigns, that the said freighters, their agents, correspondents, or assigns, should, within the ninety running days first above limited, or days of demurrage therein mentioned, at one of the said islands of *Dominica*, *Grenada*, or *St. Christopher's*, load and send along side of the said ship, at their own expence, in manner and proportions, and with the assistance aforesaid, such full and complete homeward-bound cargo of sugar, coffee, cotton, and other produce, as is before mentioned; and also should, within the thirty running days last before limited, or days of demurrage thereafter mentioned, at the port of *Ostend* or that of *Bruges*, at their own expence, in manner and with the assistance aforesaid, unload and receive her said homeward-bound cargo, and pay for the freight thereof at and after the rates following (that is to say), for sugar, at the rate of 9s. sterling for each and every 112lbs. net English weight of sugar; for coffee, at the rate of 11s. sterling for each and every 112lbs. net English weight of coffee so delivered; for cotton, at the rate of 3d. sterling for each and every net pound English weight of cotton so delivered; and for other goods and produce in proportion to the said rates of freight, with 5 per cent. primage on the whole of the said freight, the whole to be paid at *Ostend*, on the final delivery of the said homeward cargo, either in good bills of exchange on *London*, or in money, at the rate as the exchange should there govern, between the said port of delivery and *London*, at the option of the Captain: and it was thereby mutually agreed by the said parties, that the said freighters, their agents, correspondents, or assigns, at the said island of *Dominica*, were to declare in forty-eight hours after due notice given to them of the said ship's arrival there, whether she was to load there or proceed to either of

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the islands of *Grenada* or *St. Christopher's* to take in her loading; that at the island where the said ship should be so ordered to load in the *West Indies*, the commissioner should not receive, take, or stow on board her any other goods or produce but such as should be tendered to him by the said agents, correspondents, or assigns of the said freighters, or which he should be authorized to receive by written orders from them, which goods and produce so loaded should be exclusively consigned to the said freighters at *Ostend* or *Bruges*; that the said ship was to be consigned to the said freighters or their assigns at *Dominica*, *Grenada*, and *St. Christopher's*, as well as at *Ostend* and *Bruges*: and lastly, that it should and might be lawful to and for the said freighters, their agents, correspondents, or assigns, to keep the said ship on demurrage ten days in the whole, or so many of them as need should require, they paying unto the commissioner of the said ship, for such demurrage, at the rate of 6*l.* sterling per day, day by day, as the same should grow due, as by the said charterparty amongst other things, relation being thereunto had, will more fully and at large appear. And the said P. in fact says, that the said ship did, after having unloaded her outward bound cargo, and as soon after as she could be put in a fit and proper condition for her voyage in the said charterparty described, proceed to the said island of *Dominica*, in the *West Indies*, and afterwards, to wit, on the 19th *January*, 1783, did arrive at the port of *Rosseau*, at the said island of *Dominica*, and that afterwards, to wit, on the 20th *January*, 1783, he the said P. gave notice of the arrival of the said ship at the said port of *Rosseau*, in the said island, to one *David Fraser, Esq.* he the said *David Fraser* being an agent for the said freighters at the said island of *Dominica*; and that the said *David Fraser*, so being such agent as aforesaid, did according to the covenant in the said

charterparty in that behalf, to wit, on the 22d day of *January*, in the said year of our Lord 1783, declare that the said ship was to load at *Dominica* aforesaid, that is to say, at &c. aforesaid: and the said P. further in fact says, that the said ship did lie at the said port of *Rosseau*, at the island of *Dominica* aforesaid, for the space of ninety running days, and also for ten days and upwards after the expiration of the said ninety running days next after the arrival of the said ship at *Dominica* aforesaid, to wit, until and upon the 19th day of *May*, in the year of our Lord 1783, to receive a cargo, and that the said P. was, during that time, ready and willing, and the said *David Fraser*, the agent of the freighters, well knew that the said P. was, during that time, ready and willing to load, take, and receive on board the said ship, from the said freighters or their assigns, a full and complete homeward bound cargo of sugar, coffee, cotton, and other produce, as the said ship would reasonably stow and carry in her, that is to say, three tiers of sugar in her hold, one tier of sugar in the tween decks, with a proportion of small casks for the benefit of stowage, and the remainder of her cargo in coffee and cotton, not exceeding 40 bags of the latter, of 448lbs. weight; and that he the said P. during that time, was also ready and willing with the said ship, her boats, and her crew, to give all proper and customary assistance in the loading of the said ship, to wit, at &c. aforesaid: but the said P. in fact further says, that the said freighters did not, neither did the said *David Fraser*, as agent to the said freighters, or any other agent, correspondent, or assign of the said freighters, within the said ninety running days, or days of demurrage in the said charterparty mentioned, at the said port of *Rosseau*, in the said island of *Dominica*, load or send alongside of the said ship, a full and complete homeward bound cargo of sugar, coffee, cotton, and other produce, as

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in the said charterparty mentioned, or any cargo whatsoever, but neglected and refused so to do, contrary to the covenant of the said D. in the said charterparty mentioned, that is to say, at *London* aforesaid, in the parish and ward aforesaid; and the said P. in fact further says, that although the said *David Fraser*, as agent to the freighters as aforesaid, kept the said ship at *Port Rosseau*, in the island of *Dominica*, on demurrage, for the space of ten days after the expiration of the said ninety running days, as in the said charterparty mentioned, yet neither the freighters, their agents, correspondents, or assigns, have yet paid to him the said P. the sum of 60*l.*, according to the terms in the said charterparty mentioned, or any part thereof, but that the said sum of 60*l.* for demurrage as aforesaid, still remains due and unpaid to him the said P., contrary, &c.

Amongst other pleas, the defendant pleaded, that the said ship in the said charterparty mentioned, did not unload her outward bound cargo at the said island of *St. Thomas*, before she proceeded to the said island of *Dominica*, according to the form and effect of the said charterparty; and this, &c. And a further plea, that the said ship in the said charterparty mentioned, at the time of making the said charterparty, to wit, on the said 12th *April*, 1782, was lying and being in the port of *Plymouth*, in the county of *Devon*; and that the said ship, being in all things fully and completely trimmed, rigged, fitted out, victualled, and manned for the said outward voyage in the said charterparty mentioned, did not set sail and depart from the port of *Plymouth* aforesaid, within a reasonable time, from the time of the making of the said charterparty, but on the contrary thereof, the said P. wilfully, and without any reasonable or probable cause, kept back and detained the said ship at *Plymouth*, from the

time of the making of the said charterparty until and upon the 9th day of *May* then next ensuing ; and the said defendant further says, that the said ship being so as aforesaid in all things fully and completely trimmed, rigged, fitted out, victualled, and manned for the said voyage, afterwards, to wit, on the said 9th *May*, 1782, departed and set sail from the port of *Plymouth* aforesaid, upon the said voyage in the said charterparty mentioned, for and towards the island of *Teneriffe*, in the said charterparty mentioned ; and afterwards, to wit, on the 15th *June*, 1782, arrived at the said island of *Teneriffe* ; and the said D. further says, that the said ship, after her said arrival at the island of *Teneriffe*, being in all things fully and completely trimmed, rigged, fitted out, victualled, and manned for the completion of the said outward voyage in the said charterparty mentioned, did not set sail and depart from the said island of *Teneriffe* aforesaid within a reasonable time from the time of the arrival of the said ship at the island of *Teneriffe* aforesaid ; but on the contrary thereof, the said plaintiff wilfully, and without any reasonable or probable cause, kept and detained the said ship at the said island of *Teneriffe*, from the time of the arrival of the said ship at the said island of *Teneriffe*, until and upon the 10th *July* then next ensuing ; and the said D. further says, that the said ship, being so as aforesaid in all things fully and completely trimmed, rigged, fitted out, victualled, and manned for the said voyage, and afterwards, to wit, on the said 10th *July*, 1782, departed and set sail from the said island of *Teneriffe* for and towards the island of *St. Lucia*, in the *West Indies*, and afterwards, to wit, on the 9th *August*, 1782, arrived at the said island of *St. Lucia*, in the *West Indies*, and there unloaded her outward bound cargo, and did not arrive at or unload her outward bound cargo at the said island of *St. Thomas*, in the said charterparty men-

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tioned : And the said D. further says, that the said P. wilfully, wrongfully, and without any reasonable or probable cause whatsoever, kept and detained the said ship at the said island of *St. Lucia* for the space of five months and upwards, that is to say, until and upon the 17th *January*, 1783, after her said arrival there, and for a much longer time than was necessary for the purposes of unloading her outward bound cargo, and putting the said ship in a fit and proper condition for sailing towards the islands of *Dominica*, *Grenada*, or *St. Christopher's*, or any or either of them in the said charterparty mentioned, before he set sail and proceeded with the said ship to the said island of *Dominica*, as in the said declaration mentioned ; by reason of all which said wilful and unnecessary delays and detentions of the said ship by the said P., and for no other cause whatever, the said freighters, or their agents, correspondents, and assigns, at either or any of the said islands of *Dominica*, *Grenada*, or *St. Christopher's*, were wholly disabled and prevented from procuring or loading or sending alongside of the said ship, any homeward bound cargo of sugar, coffee, cotton, or other produce, according to the said charterparty ; and this, &c.

Replication to first plea : that true it is that the said ship in the said charterparty mentioned did not unload her outward bound cargo at the island of *St. Thomas*, as the said D. has in that plea alleged, but for replication in this behalf, the said P. says, that before and at the time of the making of the said charterparty in the said declaration mentioned, and always afterwards, it was intended by the said P. that the said ship should unload her said outward bound cargo at the said island of *St. Lucia* in the said declaration mentioned, if she should be able to go into the same, and not at the said island of *St. Thomas*, unless the

said ship should, by any accident, be prevented from going into the said island of *St. Lucia*, to wit, at &c. aforesaid, whereof the said D., before and at the time of the making of the said charterparty, to wit, on the 12th *April*, 1782, at &c. aforesaid, had notice; and the said P. in fact further says, that the said ship, not being prevented by any accident from going into the said island of *St. Lucia*, did afterwards, to wit, on the 18th *June*, 1782, there arrive, and afterwards, to wit, on the same day and year last aforesaid, there unload her said outward bound cargo, to wit, at the island of *St. Lucia* aforesaid, before she proceeded to the said island of *Dominica*, to wit, at &c. aforesaid; and this, &c. Replication to second plea, protesting that the said pleas to the matters therein contained, are not sufficient in law to bar him the said P. from having and maintaining his said action thereof against the said D., to which said plea, in manner and form as the same is above made, the said P. is under no necessity, nor is he bound by the law of the land, to answer for replication; nevertheless in this behalf the said P. says, that he did not wilfully keep and detain the said ship at the island of *St. Lucia* after her arrival there, for much longer time than was necessary for the purposes of unloading her outward bound cargo, and putting the said ship in a fit and proper condition for her voyage for *Dominica*, as described in the said charterparty, before he proceeded with the said ship to the island of *Dominica*, in manner and form as the said D. hath in that plea above alleged; and this, &c.

Demurrer to these replications, and joinder in demurrer.

Wood, for defendant. The objection the plaintiff will make is, that the 2d plea is not an answer to the action; but this cannot be so. It was the intention

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of the parties, that the ship should unload her cargo at *St. Thomas*; and this was a condition precedent to the charterparty taking effect. The time of her getting to *Dominica* must have depended on the finishing of the outward bound voyage. She might as well have gone to the *East Indies* before she went to *Dominica*, if this was not a condition precedent. The crop at *Dominica* must be loaded so as to be brought home by a particular time. The plaintiff might have lost his freight for staying so long before he came to *Dominica*. *Bulst.* 169. The words here operate as a condition precedent, and the plaintiff has no ground of action.

SED PER CURIAM. This is no condition precedent. But at all events, if the ship had not arrived in time, the defendant should have objected to load; instead of which, he or his agents take to the ship; they declare that the ship shall load at *Dominica*; they keep her on demurrage; therefore they cannot now make the objection.

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See AGENT. AUCTIONEER. APPEARANCE. 2. BAIL, 6, 52. EJECTMENT, 20, 25, 35. PLEADING, 17. SETTING ASIDE PROCEEDINGS, 6. UNDERTAKING.

1. A clerk, in order to be admitted an attorney, must actually serve five years under articles; therefore where a clerk had served part of his time with a master who had left the country, and before his articles

were assigned to another master an interval of ten months had elapsed, during which he was not serving under any articles, but under the assignment he served the remainder of the time specified; the court would not allow him to be admitted until he had served out the ten months under new articles. *Esparte Rowle*.

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2. A rule nisi granted to discharge an articulated clerk, where the attorney had become bankrupt, and absconded; and the rule should be served at the last place of abode of the clerk to the commission, and stuck up in the King's Bench office. *Anon.* 62
3. An attorney must be sued by bill, although he has given a bill of exchange; and plaintiff being an attorney, court set aside the proceedings with costs. *Atkins v. —*. 63

4. An attorney's bill may be referred to the Master for taxation, after an action had been brought upon it, and a verdict recovered, on a suggestion that some of the items of the bill would not have been allowed by the Master, had it been originally referred to him for taxation; but upon the terms of the defendant paying the costs of the application, the costs of taxation, and the costs of the cause as between attorney and client, the plaintiff being at liberty to take out the money forthwith which had been paid into court. *Lee, gent. one, &c. v. Wilson*. 63

5. In a motion for a rule nisi for an attachment against an attorney for not delivering a bill of costs, the affidavit must swear to personal service of the rule. *Anon.* 66
6. Attachment for not paying over surplus money when bill has been served for taxing an attorney's bill; court will not grant an attachment against attorney for not paying the balance due to his client, until the costs have been taxed, though the balance is admitted, and though it is agreed to dispense with taxation. — *v. Barton, one, &c.* 66

7. A summary application may be supported against an attorney, to compel him to pay monies received by him, though he was not employed in any suit; and an agent may make the application, though he has no authority to receive; and the court will compel the payment into court, for benefit of parties interested. *De Woolfe and others v. —*. 68

AUCTIONEER.

See PRINCIPAL AND AGENT. SET-OFF.

AUDITORS.

See ACCOUNT.

AUTRE ACTION PENDANT.

See BILLS OF EXCHANGE, 93.

AUTRE FOIS ACQUIT

See NEW TRIAL, 14.

AWARD.

- See ARBITRATION.

BAIL.

See AFFIDAVIT, 3 to 6, 10. APPEARANCE, 4. ARREST, 4, 5. COMMITMENT, 1. REG. GEN. 7, 11, 15, 16, 26. UNDERTAKING.

1. The statute 43 Geo. III. c. 46, sec. 2, does not controul the discretion of the court with respect to the time for putting in bail; and therefore where money is paid into court in lieu of bail, and bail is not put in and perfected in due time, the court, on an affidavit of merits, will grant further time to the defendant. *Parker v. Turner*. Page 71

2. Where a verdict was found for the plaintiff in a larger sum than the judge's order to hold to bail, the defendant, in order to be bailed out of custody, must justify in such larger sum; but otherwise where a rule was made absolute for a new trial, and then in the smaller sum. *Dyott v. Dunn*. 72

3. Bail may be taken after final judgment. *Stanton's bail*. 73

4. After final judgment is signed, the defendant's bail may put in fresh bail, for the purpose of rendering him. It is not necessary that the defendant should be taken to the judge's chambers for the purpose of rendering him in discharge of his bail, unless he desires it. *Davis v. Fowler*. 74

5. Bail, who have rendered in their discharge, cannot afterwards justify so as to release defendant from imprisonment, without entering into a fresh bail piece. *Payne's bail*. 76

6. Rule nisi granted for an attachment against the sheriff, where the bail was put in by a new attorney, without an order for the attorney being changed. *Anon.* 76

7. The sixty sworn clerks of the Six Clerks' Office, do not come within the operation of the rule which prohibits the officers of the court from becoming bail. *Dutton v. Helstead*. 77

8. If, in an action at the suit of two, bail be put in as in an action at the suit of one only, the bail may be treated as a nullity. Bail rejected, on the ground that his children were in the workhouse, and he would not assign a reason. *Anon.* 77

9. Bail rejected, for suffering his father to receive parish relief. *Holm v. Booth*.
Page 78
10. Bail having been recently bankrupt, not permitted to justify, although worth 500*l.* at the time he offered to become bail. *Butler's bail*. 78
11. A person liable upon outstanding dishonoured bills not renewed, or the right of proceeding against him not suspended, cannot justify as bail. *Barnesdall v. Stratton*. 79
12. It seems, that when the court orders bail to submit their property to inspection, in order to ascertain its sufficiency to enable them to justify, the plaintiff may cause it to be appraised by a broker. *Tudor v. Simpkin*. 80
13. Where the notice of bail being put in, named the defendant in the right name, "sued by" the wrong name, and the bailpiece called him by the wrong name only, held sufficient. *Anon.* 81
14. Bail described as of *Battlebridge*, in notice of bail, insufficient. *King's bail*. 81
15. Service of notice of bail, by sticking up a copy in King's Bench Office, and by putting another under door of attorney, sufficient, if he cannot be personally seen. *Atkinson v. Thompson*. 81
16. Service of notice of bail, by leaving same at a stationer's, where the plaintiff's attorney's papers are usually left, is sufficient. *Anon.* 82
17. Where no bail is put in at expiration of rule to bring in body, bail afterwards put in are bound to justify within four days in town cause, or six days in country cause, without being excepted to. *Story's Case, ex relatione Ma. Foster*. 82
18. An affidavit for further time to justify bail, on the ground that bail cannot attend, must state the consent of the party to become bail. *Hamilton v. Daunsford*. 82
19. Time to amend errors in notice of bail, not allowed. *Rennell v. Atkins*. 83
20. A judge will not interfere with another judge's order for time. *Tomlinson v. Harvey*. 83
21. A rule for further time to justify bail, drawn up as of a wrong day, where immaterial. *Donaldson's bail*. 83
22. Defendant may put in fresh bail, when time has been granted to plaintiff to inquire into the sufficiency of the former. *Freeman v. Oldham*. 84
23. A clerk in court in the Exchequer must sign all proceedings, and not an attorney or agent. A notice to justify bail on an equity day, is bad. *Partridge v. Rose*. 84
24. Notice of justification of bail on *mesne process*, added in vacation, need not be given within four days. *Aliter* as to bail in error, for they cannot be changed. *Anon.* 84
25. It is no objection to the notice of justification, that it stated that two were added bail, when in point of fact, only one was added. *Anon.* Page 86
26. The plaintiff and defendant's names, in the notice of justification of bail, being transposed, is not a ground of rejecting the bail. *Anon.* 86
27. Time allowed to justify bail, where the notice of justification did not state the addition of the bail, but described him contrary to the fact, as bail of whom notice had before been given, on condition that the defendant should produce an affidavit that the error was accidental. *Atkinson's bail*. 86
28. Bail rejected, where the notice of justification, and the affidavit of notice, were served by different attorneys, without a rule to change the attorney. *Anon.* 87
29. If an attorney be not at chambers in office hours, service on a person with whom the attorney's papers are directed to be left, is sufficient. *Thompson's bail*. 87
30. Service of the notice of justification of bail on the master of a house, in which the attorney had an office, is not sufficient, unless some privity be shewn to exist between them. *Freeman's bail*. 88
31. Service of the notice of justification of bail after ten o'clock, is bad, though the person on whom the notice was served read it. *Anon.* 88
32. Notice of justification, stuck up in the King's Bench Office for the plaintiff, an attorney, who had no known place of residence or business, is sufficient. *Anon.* 89
33. The court has no power to order the payment of costs of vexatious notices of justifying bail at chambers, before the defendant is permitted to give a fresh notice, where there has been a change of the defendant's attorney. It seems to be otherwise where the same attorney has acted vexatiously in giving repeated notices. — *v. Clarke*. 89
34. One of the bail may be taken, by affidavit, before a commissioner in the county, and the other before a commissioner in town. *Mandorf's bail*. 90
35. It is not necessary that, in bail by affidavit, both bail should justify before the same commissioners. *Anon.* 91
36. In bail by affidavit, the affidavit of justification need not be sworn before the same commissioner as that before whom the affidavit of taking bail was sworn. *Brealey v. Holt*. 91
37. The jurat to an affidavit by a marksman, must state that it was understood by him, as well as that it was read over and explained to him. *Allworthy's bail*. 92
38. An affidavit by a marksman, must state that the mark was made in the presence of the commissioner. *Anon.* 92

39. In bail by affidavit, time allowed where the two deponents' names were not mentioned in the jurat. *Drabble v. Drubham*. Page 92
40. Bail allowed to justify, though no bail bond had been taken, the writ appearing to have been returnable in a prior term. In the case of a prisoner, notice of bail may be given by one attorney, and notice of justification by another. *Crow v. Watson*. 93
41. Where bail, put in by one attorney, attempted to justify by another attorney, time given to change the attorney regularly. *Malperson's bail*. 93
42. The time for justifying bail in the Exchequer is before ten o'clock in the morning. *Tomlinson's bail*. 94
43. Bail, though opposed in two actions, must be opposed in each separately. *Anon.* 94
44. Husband of defendant, who had married after the arrest, and before the return of the writ, allowed to justify as one of the bail. *Salter v. Whitfield*. 94
45. Bail, who did not know whether he had been arrested or not within the space of two years, rejected. *Newman's bail*. 95
46. An affidavit, that A. and B. and each of them, were worth double the sum sworn to in the affidavit to hold to bail, exclusive of all debts due to any other person, is sufficient. *Holmes's bail*. 95
47. *Quare*, if a beneficial leaseholder is sufficient bail, where he is neither freeholder nor householder. *Anon.* 96
48. A leaseholder for ninety-nine years admitted as bail by consent. *Anon.* 96
49. A copyhold estate in right of his wife, is not sufficient property for bail. *Anon.* 97
50. It is no objection to the justification of bail, that he was not acquainted with the defendant. *Jameson's bail*. 97
51. No objection to bail, that he had been transported thirty years ago. *Hatfield's bail*. 98
52. It is no objection, that the bail were put in by an uncertificated attorney. *Anon.* 98
53. Where counsel was instructed to oppose bail, who were by mistake allowed to pass without opposition, they were ordered to come up again on another day, and the rule for allowance in the mean time stayed. *Addison v. Foster*. 98
54. A render may be made by the party himself, and without an attorney. *Nethersole's bail*. 99
55. The sheriff is liable to an attachment for not bringing in the body, if the rule for the allowance for bail be not served in time, although the bail justified after opposition of counsel, in the presence of the plaintiff's attorney. *The King v. The Sheriff of Middlesex*, in a cause ——— *v. Farquhar*. Page 99
56. Bail have eight days to surrender the principal; and where the render was made in due time, court set aside proceedings against bail, and held that plaintiff was not entitled to costs of writs issued against the bail before notice of rendering. *Smith v. Lewis*. 100
57. The court will not grant a rule to enlarge the time for the bail to render the bankrupt defendant, unless it be sworn that the application was made by the bail. *Harris v. Glossop*. 101
58. In order to fix bail, the *ca. sa.* must be left four days in the public book in office, and not in the secret book. *Hutton v. Itchen and another, bail of Jacob*. 102
59. Bail struck out of bailpiece, on the ground of his being a material witness, and another allowed to justify in his stead. *Anon.* 103
60. The court will stay the proceedings on a bail bond, without costs, if the notice of render be given before the assignment, otherwise not. *Anon.* 103
61. The court will not enter an *exoneratur* on bailpiece, on the ground that the principal was a lunatic, and the marshal had refused to receive him into his custody. *Anderson's bail*. 104
62. Bail may apply to enter an *exoneratur*, if principal becomes bankrupt, at any time before they are actually fixed; and where first *sci. fa.* did not issue till six days after the bankruptcy of the bail, court set aside the execution which had issued against bail, but with costs to be paid by the bail. *Morley v. Gudge and another, bail of Gudge*. 104
63. If defendant be discharged under insolvent act, the court will order *exoneratur* on bailpiece. ——— *v. Bruce*. 105
64. Bail in error should be for double the sum for which judgment is entered up. *Phillipson v. Browne*. 105
65. Though a writ of error be allowed, yet if bail in error be not afterwards put in, it will be nullity, though defendant in error has treated the writ of error as a nullity. ——— *v. Nichols*. 106
66. Time granted to add and justify bail by *habeas corpus*, where one of the bail was so ill as to be unable to attend. *Gwillim v. Howes*. 107
67. Rule for staying proceedings on bail bond may be obtained the same day that bail justified. *Shawe v. Johnston*. 108
68. Where bail are not put in, they must justify without exception; and if not justified, plaintiff may take an assignment of, and proceed upon the bail bond. *Nann v. Rogers*. 108
69. Affidavits in support of rule to set aside

proceedings by assignee of bail bond, may be entitled in action on bail bond, or in the original cause.

Notice given of bail as put in before one judge, when in fact they were put in before another, is irregular, and the court will not stay the proceedings on the bail bond. *Kelly, Assignee of the Sheriff, v. Wrother.* Page 109

70. After the defendants have been admitted to bail on a criminal charge, the court will not, on affidavit of aggravating facts, increase the bail. *Res v. Salter and others.* 109

71. A motion to bail a defendant for an assault, must be made before a judge at chambers. *The King v. Page.* 110

72. Prisoner brought up on a charge of horse stealing, admitted to bail. *The King v. —.* 110

BAIL BOND.

See BAIL, 40, 60, 67, 68, 69.

1. To a plea in action on bail bond, at the suit of the assignee of the sheriff, that the assignment of the bond was not stamped before the exhibiting of plaintiff's bill in the cause, the plaintiff need merely reply that the assignment was stamped at or before the exhibiting the bill, and conclude his replication to the country. He need not take issue as to the time when the bill was exhibited, nor aver that the assignment was stamped "before the commencement of the suit," if the action thereon be in K. B. And if the plaintiff avers that it was stamped at *Westminster*, he may nevertheless conclude to the country. *Canter, Assignee of Sheriff of Middlesex, v. Yates.* 533

2. In an action on a bail bond, the return of the writ, on which the defendant in the original action was arrested, must be stated with certainty. *Everett and another, Assignees, &c. of Sheriffs of London, v. Tunnard, gent. one, &c.* 624

BAILEE.

See PLEADING, 17.

BAKER.

See QUO WARRANTO, 6.

BALLASTAGE.

See TRINITY HOUSE.

BANKERS.

See PAYMENT.

BANK OF ENGLAND.

See BILLS OF EXCHANGE, 11.

BANKRUPT.

See ARBITRATION, 4. ARREST, 5. ATTORNEY, 2. BAIL, 10, 62. COSTS, 1. EXECUTION, 2. OVERSEER, 2. PAYMENT. PARTNERS, 2. PLEADING, 27. TRIAL, 2.

1. The statute does not authorize the court to receive affidavits to explain the conduct of, and circumstances under which, a person was committed by commissioners of bankrupt, for not satisfactorily answering questions put to him, touching a bankrupt's estate and effects. *In the matter of John James.* Page 112

2. The sheriff having levied upon goods in possession of a defendant, who was a bankrupt, paid over the proceeds to the assignees, on their claiming them; and defendant afterwards again becoming a bankrupt, and obtaining his certificate, but not paying 15s. in the pound (and therefore not protected by 5 Geo. 2, c. 30, s. 9), a second execution issued for the same debt; and held that the latter execution was regular, without the first writ having been returned. *Priest v. Mihus.* 114

3. Debt does not lie against a bankrupt on the *reddendum* of a lease, for rent accruing after the commissioners' assignment, the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate. *Qu.* if an action of covenant would, in such case, lie against the bankrupt. *Wulham v. Marlow.* 600

4. An innkeeper, as such, is not a trader under the bankrupt laws; neither is an innkeeper, selling wine and brandy and other liquors by the dozen, to customers out of his inn, necessarily a trader. *Willott and others, Assignees of Aram, a bankrupt, v. Thomas and others.* 651

BARON AND FEME.

See BAIL, 44. PLEADING, 40, 43. ORDER OF SESSIONS.

1. Judgment allowed to be entered up against husband and wife, on warrant of attorney given by *feme dum sola.* *Hartford v. Mattingly.* 117

2. Though wife live separate from her husband, and support her children, and earn salary for her services, yet the party owing it cannot pay her, after notice not to do so; and if he do, the husband may sue him for the salary. *Glover v. Proprietors of Drury Lane.* 117

BEASTS OF PLOUGH.

See DISTRESS.

BEQUEST.

See EXECUTOR.

BODY RULE.

See SHERIFF, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See ATTORNEY, 3. BAIL, 11. INTEREST, 1. NEW TRIAL, 10. PLEADING, 10, 31.

1. It is no cause against a rule for referring a bill of exchange to the Master to compute, to shew that the judgment signed was irregular; such irregularity must be the subject of a counter motion to set aside the judgment. *Murray v. Winkfield.* Page 119
2. A party is liable on a promissory note, made in the name of the firm in which he had been a partner, though it was drawn after the dissolution of the partnership, he having suffered his name to continue in the firm, and although plaintiff knew the facts at the time he took the note. *Brown v. Leonard and Bush.* 120
3. A bill drawn and accepted after the dissolution of partnership, though dated before, does not bind the other partner. Notice of the dissolution in the *Gazette*, is notice to all the world. *Wright and others v. Pullham.* 121
4. A bill of exchange, altered in the date by the son of the payee, at the suggestion of the acceptor, who afterwards accepted it, is unavailable. *Walton v. Hastings.* *ib.*
5. Bill altered in date after acceptance, but before it was put into indorsee's hands, held good. *Johnson v. Garnett.* 122
6. Though bill altered by drawer after acceptance, with consent of the plaintiff, the payee, but without the actual assent of the acceptor, and which alteration made the bill payable twenty days later. Yet *semble*, the acceptor is liable where it appears to be an accommodation bill, and acceptor would accept any bill drawn by the drawer, and therefore strong presumptive evidence that the drawer was sufficiently the agent of the acceptor to have authority to make this alteration. *Johnson v. Gibb.* 123
7. A witness on the trial of a cause may refresh his memory from a document, though not written by himself. Presentment of a bill out of the usual hours is sufficient, provided somebody be at the place, and also sees the bill, or gives an answer, otherwise not. *Henry v. Lee.* 124
8. The drawer of a bill is not discharged, though a *fi. fa.* sued out against the acceptor on the same bill be waived. *Pole v. Ford.* 125
9. Debt lies on a bill of exchange payable to the drawer's own order, at the suit of the first indorsee, against such drawer. *Stratton v. Hill.* And debt lies by drawer

against acceptor of bill. *Pridly v. Henbry.* Trin. Term, 4 Geo. 4. Page 126

10. A bill given for a supposed balance of accounts, to be hereafter settled on a day appointed, and which bill was dishonoured by the acceptor (the defendant), and after it was due, indorsed by the drawer to the plaintiff, the relative situation of debtor and creditor not being created between the drawer and acceptor, the plaintiff cannot maintain an action on it as indorsee. *Ferley v. Saunders.* 127
11. The statute 4 Geo. 3, giving protection to the Bank of England against competition, does not prevent merchants from issuing bills short of six months date, though there be more than six partners in their firm, if really not bankers, and only done for the purpose of their commerce. *Wigan v. Fowler and another.* 128
12. A letter from the holders of a promissory note to the defendant, the indorser, saying, "the maker is not ready to pay, but will be in a week, which is time enough for us," is not giving time, so as to discharge the indorser. *Margesson v. Goble.* 364
13. An indorsee of a bill, without notice that a prior action is depending thereon, may, notwithstanding the pendency of such action, commence an action against the same defendant. *Columbics v. Slim.* 637

BILL OF LADING.

See SHIPS AND SHIPPING.

BREACHES.

See PLEADING, 8

BRIDGE.

See INDICTMENT

BROKER.

See BAIL, 12.

BYE-LAW.

See CORPORATION, 1.

CANCELLATION OF AGREEMENT.

See PLEADING, 22.

CAPIAS AD SATISFACIENDUM.

See BAIL, 58. EXECUTION, 1. REG. GEN.

CARRIER.

See ABATEMENT, 1. CONTRACT, 2. SHIPS AND SHIPOWNERS.

CASE (ACTION ON THE).

See DECLARATION, 4. PLEADING, 15.
ACCIDENT.

CATHEDRAL.

See EVIDENCE, 4.

CAUSES FOR TRIAL.

See REG. GEN. 28. STRIKING OUT PLEAS, 3.

CERTIFICATE OF BANKRUPT.

See BANKRUPT, 2.

CERTIFICATE OF JUDGE AS TO COSTS.

See COSTS, 9.

CHARTERPARTY.

See FREIGHT. DEMURRAGE.

1. Under a proviso in a charterparty, that "the ship should lie at *New York* for taking on board her cargo, and at *London* for delivering the same, twenty running days in the whole, if not sooner discharged," the ship may be detained for these purposes seventy days at each place. *Stevenson v. York*. Page 572.
2. The discharge of an outward bound cargo at a particular place, is not in general a condition precedent to the providing a return cargo. A freighter, who covenants to load a return cargo, must, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and must not, by any act, take to the ship. *Olssen v. Drummond*. 705

CERTIORARI.

See COSTS, 15, 16.

1. A *certiorari* will not be granted to remove an indictment against several defendants charged with a misdemeanour, unless they all concur in the application; and it seems that a consent by counsel is not sufficient, unless supported by an affidavit of the consent.

The court will remove an indictment for a misdemeanour, from *Lancashire* to *Yorkshire*, if there is any reasonable cause of suspicion, or apprehension that justice will not be impartially administered in the former county. *The King v. Henry Hunt and others*. 130

2. A statute, taking away a *certiorari*, does not take it from the crown, unless expressly mentioned. *Rex v. —*. 136
3. *Certiorari* granted to bring up a conviction, where the magistrate had rejected

the vendee as a witness, to prove that the defendant used the Winchester bushel. *Rex v. —*. Page 137

1. There must be a rule *nisi* in first instance, for *certiorari*, against commissioners of sewers. *Anon*. 137

CESSIO BONORUM.

See ARREST, 4, 5.

CHIROGRAPHER'S OFFICE.

See REG. GEN. 17.

CHOSE IN ACTION

See BILLS OF EXCHANGE, 10

CHURCH.

See MANDAMUS, 9

CHURCHWARDENS.

See MANDAMUS, 8. OVERSEERS.

CLERGYMAN.

See MANDAMUS, 5.

CLERK.

See ATTORNEY, 1, 2. ERROR, 3. MANDAMUS, 5.

COACH PROPRIETORS.

See CONTRACT, 2.

COGNOVIT.

See REG. GENERALES, 13.

COMMITMENT.

See BANKRUPT, 1. OVERSEERS.

1. It is not necessary, on prisoner being brought up by *habeas corpus*, that the warrant of commitment should state that the offence was feloniously done. It may be a sufficient ground for committing, and not bailing, though the ground would not be sufficient to convict. *Rex v. Croker*. 134
2. A commitment in execution for three months, on 12 Geo. 2. the Goldsmith's Company Act, for not paying penalties recovered by judgment in an action, cannot be obtained till a *fiery facias* has been ineffectually issued. *Biddle, qui tam. v. Ustonson*. 139

COMMISSIONER OF AFFIDAVITS.

See BAIL, 34 to 38.

COMMISSIONER OF SEWERS

See CERTIORARI, 4.

COMMON (RIGHT OF).

See PLEADING, 7.

COMPOSITIONS.

See TITHES.

COMPUTE (REFERENCE TO).

See ANNUITY, 1. BILLS OF EXCHANGE, 1.

COMPOSITION DEED.

See DEBTOR AND CREDITOR.

COMPROMISE.

See COVENANT, 2.

CONCEALMENT.

See INSURANCE.

CONCILIUM.

See RULES, 2.

CONDITION.

See PLEADING, 22.

CONSENT OF PARTIES TO ACTION

See EJECTMENT, 1, 2. SETTING ASIDE PROCEEDINGS, 1.

CONSIDERATION.

See PLEADING, 32. TRADE, 1, 2. OFFICE, SALE OF.

CONSPIRACY.

See CRIMINAL INFORMATION, 2. INDICTMENT, 2.

CONSTABLE.

Constable seizing a person by direction of custom house officer, who had himself no power to seize, is not within protection of the Custom House Act, there being no pretence that he was acting within the scope of his duty. *Norton v. Miller*. 140

CONSTRUCTION OF CONTRACT.

See CONTRACT, 1, 2. CHARTERPARTY.—OF ACTS OF PARLIAMENT, *see* FISHERY. MANDAMUS, 3.—INCLOSURE ACT. SHIPS AND SHIPPING, 2.—OF DEEDS, *see* PARTNERS.—OF DEVICES, *see* DEVISE. INDEMNITY, 3. DEBTOR AND CREDITOR. COVENANT, 2.

CONTINGENCY.

See INSOLVENT DEBTOR, 1.

CONTEMPT OF COURT, OR ORDER.

See ATTACHMENT, 2.

CONTRACT.

See AGREEMENT. PLEADING, 22, 26. TRADE, 1, 2. VENDOR AND P.

1. Contract to deliver pheasants on the 1st of October. It is sufficient if they be sent on that day to the coach office, though they do not arrive till afterwards. *Honeywood v. Stone*. 142
2. Two persons contracting to assist defendant with their respective horses, but to give in their accounts separately, held separate contracts. *Smith & Taylor v. Hunt*. 142

CONVICTION.

See CERTIORARI, 3. STRIKING OUT PLEAS, 1.

1. A party may be convicted on a statute giving part of penalty for the offence to the parish wherein it is committed, on the oath of a witness residing within the parish, provided such witness does not pay rates. *Rex v. Cottrell*. 497
2. The description of an act in a conviction, as having been passed in the 25th year of the king's reign, when in fact the parliament, in which the act was passed, was continued by prorogation from the 24th to the 25th year of the reign, is not misdescription. *Rex v. Windsor*. 513
3. A conviction, stating an offence to have been committed in the alternative, is bad. A conviction under the 5 Geo. 3, c. 14, for killing fish in a private river, without the consent of the owner, should state that the offence was committed in an inclosed ground. *Rex v. Sadler*. 519
1. In a conviction, it must appear that the evidence on which the defendant was convicted, was given in his presence; and where a conviction merely stated that the defendant, on such a day, appeared before a magistrate on a summons, and that the magistrate proceeded to examine into the offence, and that it appeared to him, on the oath of the witnesses, that the offence was committed; it was held bad. So the evidence whereon the defendant is convicted, must appear on the face of the conviction. In a conviction under the Hawker's act, 25 Geo. 3, c. 78 (now repealed), against a party for travelling about from town to town, and selling goods by retail there, the places of sale not being his usual place of abode, the conviction should specify the goods sold. It is not necessary in a conviction to state how the witnesses were sworn. *Rex v. Selway*. 521

5. A conviction under the 5th *Ann.*, c. 14, stating in information that the defendant "killed a hare," is bad. *Rex v. Morgan*. Page 563
6. In a conviction under the 2 *Geo.* 2, c. 26, s. 4, for working a boat in the river *Thames* for hire, without being qualified so to do, it must expressly appear from the evidence in the conviction, that the defendant worked the boat for hire. *The King v. Taylor*. 578

COPYHOLD.

See BAIL, 49.

CORPORATION.

See EJECTMENT, 24. QUO WARRANTO, 1. Though bye law of corporation requires indenture of apprenticeship to be inrolled, if it has been exhibited to town clerk, who marked it inrolled, it is sufficient, notwithstanding it is not inrolled in the corporation books. *Qu.* Under bye law, service at another place is not sufficient, unless the trade there was subservient to the trade at *Cambridge*. *Rex v. Mayor, &c. of Cambridge*. 144

COSTS.

- See APPEARANCE, 3. ARBITRATION, 2, 4. ATTORNEY, 4, 5, 6. BAIL, 23. DECLARATION, 1. EVIDENCE, 9, 10, 11. IRREGULARITY, 10, 11. NEW TRIAL, 3, 7. NON PROS. PLEADING, 2. PROCHIEIN AMI. QUO WARRANTO, 2. REG. GEN. 11. STRIKING OUT PLEAS, 2. WARRANT OF ATTORNEY, 2.
1. The defendant was arrested at the suit of a plaintiff, who becoming bankrupt, the proceedings were dropped; and the assignees having again arrested the defendant, the proceedings were set aside, the Chancellor having superseded the commission; but a fresh commission having issued, and another set of assignees being chosen, they arrested the defendant again, and were proceeding in their action; held, that these proceedings could not be stayed until the costs of the proceedings at the suit of the first set of assignees were paid. *Semble*, where proceedings have been set aside for irregularity, the plaintiff is not bound to pay the costs thereof, before he is at liberty to commence a fresh action. *Dawson v. Sampson*. 146
2. Costs for defendant under the 43 *Geo.* 3, c. 46, where a verdict was taken for a less sum than that which the plaintiff held the defendant to bail for refused, where the right to recover the whole sum claimed was fairly triable. *Edgington v. Hunt*. 147
3. Costs of a special original allowed between attorney and client, where action was brought on a bond, the penalty of which was more than 50*l.*, but the sum due was only 20*l.* — *v. Bonar*. Page 148
4. The court will grant a rule, that plaintiff may give security for costs, though it does not appear that application has been made to him to give security, notwithstanding an express decision to the contrary, in *Mich.* 35 *Geo.* 3. *Hancock v. Smith*. 150
5. The court will not grant a rule to stay the proceedings till security for costs be given, unless a previous application be made to the plaintiff's attorney for security of costs; *alter* when it is not moved to stay the proceedings. And *semble*, it must be sworn, that defendant has not pleaded. *Anon.* 150
6. Rule granted for proceedings to be stayed till plaintiff give security for costs, though after plea pleaded. *Anon.* 151
7. If the plaintiff is a native of *England*, and departs for *France* for a mere temporary absence, the court will not compel him to give security for costs. *Anon.* 152
8. Where, in an action on a bond against several defendants, they sever in pleading, and there is an issue in fact, and verdict for plaintiff against some defendants, and the other defendant pleads infancy, and obtains judgment on a demurrer to a replication of ratification after age, the defendants who tried the issue, are not entitled to costs. *Baylis v. Dynely*. 153
9. Where the judge does certify that the cause was proper for a special jury, the party is only entitled to the costs actually paid to the attending jury in court; it is the constant practice not to allow more costs. *Curren v. Durham*. 154
10. Independently of the statute as to taxation of costs, the court still retains power at common law to order bills generally to be taxed. *Anon.* 155
11. Full costs in an action on statute of *Edward* 6, for treble value of tithes not set out, where there was a verdict for plaintiff, subject to a reference, and the arbitrator directed a verdict to be entered for treble value, 1*l.* 10*s.* *Pedley v. Frampton*. 155
12. An award of less than 5*l.* on the reference of a cause, brings it within the *London* Court of Conscience Act. *Day v. Mearns*. 156
13. If the submission to a reference mentions nothing respecting costs, the arbitrators have no power to award them to be paid by either party in particular. *Bell v. Belson*. 157
14. If a party obtain a rule for setting aside judgment and execution, on condition of his paying costs, the court will not issue

an attachment, in the first instance, for not paying those costs. — *v. Mynde*.
Page 154

15. Where an indictment was removed by *certiorari*, at the instance of the defendant, who was brought up in the King's Bench to receive sentence, being that he should be imprisoned in *Morpeth* gaol; held, that the costs of sending thither should be taxed to the defendant. *Rex v. Gilbie*. 159

16. Rule granted to refer it to the Master of the Crown Office to tax, in favour of defendant, the costs of a *certiorari*, the record having been withdrawn without notice. *Rex v. —*. 159

COUNSEL.

See NEW TRIAL, 1.

COURT OF CONSCIENCE ACT FOR LONDON.

See COSTS, 12.

COVENANT.

See CONSTRUCTION. ACTION OF, *see* SET-OFF, 2. VENUE, 6. PLEADING, 16. BANKRUPT, 3. LANDLORD AND TENANT, 4.

1. In an action of covenant for not indemnifying against taxes, no plea of set-off can be sustained. *Cooper v. Robinson*. 161

2. A covenant by a party, that so long as defendant should continue and be in the actual receipt of the profits of a rectory, she would pay a yearly sum during the life of the rector, by two half yearly payments, must be construed as a covenant for the payment of such yearly sum, whilst the covenantor is in receipt of the profits, during the life of the rector, and not whilst he is merely in receipt of the profits. *Combe, executor of Phipps, v. Jones*. 700

CRIMINAL CHARGE.

See NEW TRIAL, 13, 14.

CRIMINAL INFORMATION.

1. An affidavit to found a motion for a criminal information for a libel, must distinctly negative the charge, unless the party libelled be abroad, or the charge be general. *Rex v. Wright*. 162

2. On motion for criminal information against two persons, for endeavouring to raise price of oil, it must appear distinctly that they combined together, as it is no offence for an individual separately so to endeavour. *Rex v. Hilbers*. 163

CRIMINAL PROCEEDINGS.

See BAIL, 70, 72. NEW TRIAL, 13, 14.

CURATE.

See MANDAMUS, 4.

CUSTOM HOUSE ACT.

See CONSTABLE.

DAMAGES.

See PLEADING, 6, 28. INQUIRY, 1. INTEREST, 2. ESCAPE.

DEAN.

See MANDAMUS, 4.

DEATH.

See EJECTMENT, 21. ARBITRATOR, 8

DEBT (ACTION OF).

See BANKRUPT, 3. BILLS OF EXCHANGE, 9. INTEREST, 2. ESCAPE, 6.

DEBTOR AND CREDITOR.

See BILLS OF EXCHANGE, 10. INTEREST, 2.

1. A covenant in an indenture (whereby a debtor assigned his effects to trustees for benefit of creditors), not to sue if trustees fairly accounted for effects, does not operate as a release of the creditors' debts, if trustees refuse to account. *Kesterton v. Sabery and another*. 541

2. In an action against a trustee under a composition deed (between the defendant *A. B.* and his creditors), for the amount of plaintiff's (a creditor's) dividends, (the deed reciting that the debtor was indebted to the several creditors, whose debts were set opposite their names in the schedule annexed to the deed, and the deed covenanted to pay a specific ratio of the debts), it is no defence to say that the plaintiff did not set the amount of his debt opposite to his name in the schedule. It is sufficient, to render the defendant liable, that he had notice of the amount of plaintiff's claim before action. *Daniel v. Saunders*. 564

DECLARATION.

See AMENDMENT, 1, 2. EJECTMENT, 5, 7, 8, 9, 10. NEW TRIAL, 7. REG. GEN. 25.

1. It is irregular to serve the writ and the notice of declaration at the same time; but where the defendant omitted to take advantage of the objection until after judgment was signed, and a whole term had elapsed, the court would not set aside the judgment with costs. *McQuick v. Davis*. 164

2. A notice of declaration served with a

- copy of a writ, is bad; and the defendant is in time to take advantage of it if he comes to the court immediately after the next step the plaintiff takes. *Hill v. Parker*. Page 165
3. Judgment set aside for irregularity, in filing declaration in chief before appearance. *Anon.* 165
4. Serviceable process in trespass and assault, and the declaration in trover, the variance is not material. *Campbell v. Palmer*. 166
5. On the removal of a cause by *habeas corpus* from an inferior to a superior court, if the plaintiff declares *de novo*, he is not bound to declare in the same form of action as that in the inferior court. *Bowerbank and another v. Walker and another*. 517

DEED.

See EVIDENCE, 5. INSPECTION OF. MORTGAGOR AND MORTGAGEE. NEW TRIAL, 12. PLEADING, 22.

DEMAND AND REFUSAL.

See TREASURER OF COUNTY.

DEMURRAGE, &c.

By a charterparty under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require," the ship having been compelled to put into an intermediate port of her ports of loading and discharge, and the freighter having detained the vessel ten days there, and also fourteen days more than ten days at the port of her delivery; in an action on the charterparty it was held, that the master could not recover on this covenant for more than the ten days demurrage, at 5*l.* per day at the port of London, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge; and a breach, averring that the plaintiff did not pay 5*l.* per day for demurrage for the extra delay beyond the ten days at the port of delivery, and for the delay at Bristol, as well as for the demurrage for ten days delay at the port of delivery, was held bad. *Stevenson v. York*. 570

DEMURRER.

See ABATEMENT, 2. PLEADING, 4.

DEVISE.

1. Under a devise of a copyhold estate to

- testator's wife, during her life, provided she continue single, but in case she did not, then unto *A. B.* when he should attain the age of 23 years; it was held, that though the widow married before *A. B.* attained that age, she was entitled to the estate until that event, and that the heirs at law were not entitled to it. *Doc ex dem. Dean and Chapter of H' Estimoteur, &c. and others v. Freeman et Ux.* Page 498
2. Under a devise to a party, of premises for life, provided he chooses to reside therein, and then to *A. B.* in fee, it is not necessary to complete *A. B.*'s right to the premises on the death of the devisee for life, that such devisee should have actually resided in the premises. The intention to reside, and which intention would have been carried into effect, had circumstances permitted, is sufficient. *Doc on the demise of Sampson v. Down and another*. 529
3. A will, directing testator's debts to be paid, and devising several estates to his wife for life, and after her decease devising his property in the words following, *viz.* "I give Mr. *W.* the income of my four shares in the Corn Market for his life, and all the rest of my estates, with all monies in the stocks, in Mr. *M.*'s hands, or any other securities, to be divided in equal shares to *E. S.* and others," passes a reversionary interest in the said four shares in the Corn Market to *E. S.* and others. *Fletcher v. Smiton*. 558
4. Under a devise as follows: "And as touching my real estates, both freehold and leasehold, situate, &c. I devise the rents and profits thereof to my executors hereafter named, until my daughters attain their several ages of 21 years, in trust, that they my executors improve the same in like manner and purpose as I have hereby directed: my personal estate for the advantage and education of my daughters; and as to the freehold and inheritance of my real estate, I devise the same to my said daughters, when and as they attain their several ages of 21 years, equally between them and their heirs for ever, to take as tenants in common; provided that if both my daughters die without lawful issue, then I devise my real estates unto and amongst my said two brothers, *T. Scholes* and *R. Scholes*, and my nephew *J. Scholes*, son of my late brother *J.* their heirs and assigns for ever, to take as tenants in common;" it was held, that the daughters only took an estate tail, with remainders over. *Chapman on the demise of Scholes v. Scholes*. 643
5. Where testatrix by will devised all her real property to *A. T.* and *E. O.* (except what she might mention in a codicil), means except what she shall mention in a valid

codicil; and testatrix having made a codicil (which was void from being unattested), devising part of her real estate to other persons, it was held that notwithstanding this, the whole of the real property passed to the devisees under the will, and not to the heirs at law. *Denn v. Taylor*. Page 681

DISCLAIMER.

See QUO WARRANTO, 2.

DISCONTINUANCE.

See REG. GEN. 14.

DISTRESS.

See LANDLORD AND TENANT, 1. PLEADING, 11.

Landlord distraining beasts of the plough, not liable, if he has used due diligence to ascertain whether sufficient distress without. Landlord not to be affected by subsequent sale at higher price than was expected. *Jenner v. Yolland*. 167

DISTRINGAS.

See APPEARANCE, 3. SETTING ASIDE PROCEEDINGS, 2.

DRAWBACKS.

The regulations of the 27th Geo. 3, c. 13, s. 3, do not apply to the temporary allowances on foreign wines granted by 27 G. 3, c. 31; and such temporary allowances may be claimed, though the wines were exported more than three years after importation. *Whitmore and others v. Papillon and others*. 624

DYER.

See LIEN.

ECCLESIASTICAL COURT.

See PROHIBITION, 1.

EJECTMENT.

See EVIDENCE, 7. AMENDMENT OF, see PLEADING, 12. REG. GEN. 8, 9, 22, 23. TRESPASS, 2.

1. Verdict in ejectment on a count on a supposed demise by a party without his authority, and without his concurring in the action, set aside. *Doe ex dem. Hamrick and Corporation of Plymouth v. Fillis*. 170
2. If a person be named in a declaration in ejectment as one of the lessors of the plaintiff, without his authority, the party served with declaration may, before ap-

pearance, move the court to have such party's name struck out of declaration. *Doe dem. Shepherd and another v. Roe*. Page 171

3. Judgment granted against the casual ejector, when the declaration was by original, and the notice was as if by bill, omitting "whosoever, &c." and it was held immaterial. *Doe dem. Thomas v. Roe*. 171
4. Rule nisi for judgment granted against the casual ejector, where the notice was in the wrong term, but the tenant in possession afterwards knew of the mistake. *Anon.* 171
5. Declaration intitled of *Michaelmas Term*, 54 Geo. 3, instead of 55 Geo. 3, but notice dated 11th January, 1815, requiring tenant to appear "next Hilary Term," held sufficient. *Goodtitle dem. Ranger v. Roe*. 172
6. The notice to appear being in "Trinity Term," instead of "Hilary Term next," judgment was allowed against the casual ejector. *Doe v. Graves*. 172
7. A wrong title of the term, in a declaration in ejectment, is an immaterial error. *Anon.* 172
8. Judgment granted against the casual ejector, where the declaration was entitled by mistake of a wrong term. *Anon.* 173
9. If the title to a declaration in ejectment is wrong, and the notice to appear thereto is correct, the defect in the title is cured. *Anon.* 173
10. Judgment granted against the casual ejector, though the real defendant's name was inserted at the beginning of the declaration instead of the casual ejector. But the party should amend.
11. The declaration in ejectment was intitled "*Doe on the demise of A. B. v. B.*" and the affidavit of the service of the declaration upon the tenant in possession was entitled "*Doe on the demise of B. and A. v. B.*" And the court, notwithstanding the variance between the arrangement of the lessors names, gave judgment against the casual ejector. *Doe on the dem. of Philip Worthington and James Worthington v. Butcher*. 174
12. Service of a declaration in ejectment on one of two joint tenants, who were also copartners in trade, is not sufficient to entitle the plaintiff to judgment against the casual ejector in the first instance, but there must be a rule to shew cause. *Doe dem. Field v. Roe*. 174
13. A rule nisi for judgment against the casual ejector, where the service was on one of three tenants in possession, and the affidavits did not state them to be joint tenants. *Right ex dem. — v. Wright*. 175

14. Rule *nisi* granted where the service was on one of two joint tenants. *Anon.* Page 176
15. Though service of a declaration in ejectment on one of three several defendants, is not sufficient, judgment will be granted against the two. *Doe ex dem. Murphy v. Moore and others.* 176
16. The affidavit in support of the rule for judgment against the casual ejector, where the tenant keeps out of the way, should state the belief of the deponent that he kept out of the way to avoid being served. *Doe dem. Batson v. Roe.* 176
17. Judgment as against casual ejector, where no one in the house, must state in the affidavit, that the party has absconded with view to avoid the service, or at least, must swear to his belief of it. *Doe dem. Lott v. Roe.* 177
18. An affidavit to ground a motion, that the service of a declaration in ejectment be good, stating that the tenant kept out of the way, &c. is insufficient, unless it swear that the person serving the declaration searched for the defendant, and could find him no where. *Anon.* 177
19. Rule *nisi*, and afterwards absolute, for judgment against the casual ejector, where the house was shut up, and no tenant was in possession, and the declaration was stuck up on the most conspicuous part of the premises. *Doe ex dem. Hale v. Roe.* 178
20. Rule absolute for judgment against the casual ejector, where the service of the declaration had been made on a person believed to have been left in possession by the tenant, who was out of the way, and also on her attorney, and a letter sent by the two-penny post, according to the attorney's direction, to the tenant's last place of abode. *Anon.* 179
21. Where the tenant in possession is since dead, and his late servant is in possession, the plaintiff had better endeavour to get possession; and if the servant who is in possession resists, then treat him as tenant, and serve the declaration on him as such; and if he does not then resist, perhaps it may be treated as a vacant possession. *Doe ex dem. Atkins v. Roe.* 179
22. An acknowledgment by the defendant, of the receipt of the declaration, is not sufficient to entitle the plaintiff to judgment against the casual ejector, unless it be sworn that the admission was before the essoign day. *Doe dem. Tindale v. Roe.* 180
23. Service of a declaration in ejectment on a brother of the tenant in possession, is bad, for want of an acknowledgment by the tenant that he had received it. *Right dem. Firbank v. Roe.* 180
24. Rule *nisi* granted to make the service of a declaration in ejectment on the clerk of a public body (the clerk having been directed to be appointed by act of parliament), good service. The affidavit to ground such a motion must not be entitled in the real names of the defendants. *Anon.* Page 181
25. Rule *nisi* granted for judgment against the casual ejector, where service of the declaration was made on an attorney who represented himself to be the agent for the tenants in possession, and would appear for them. *Anon.* 181
26. The court will, in the first instance, only grant a rule *nisi* for judgment against the casual ejector, where the affidavit does not swear that the import of the declaration was explained to a servant to whom it was delivered. *Anon.* 182
27. Rule granted to shew cause, why the service of a declaration in ejectment on a son of the tenant in possession (who said that his father was unable to attend to any business, and a subsequent admission by a person whom the deponent believed was the wife of the tenant in possession, that her husband had received it) should be good service. *Anon.* 182
28. Judgment against the casual ejector, where the service of the declaration was made on a person who had the care of tenant in possession (a lunatic), and the management of his affairs, though not appointed by a regular committee.
N. B. The rule *nisi*, in such a case, should be generally to shew cause, without being directed to any party in particular. *Doe ex dem. Lord Ighesbury v. Roe.* 183
29. Rule absolute for judgment against the casual ejector, where rule *nisi* was served on the servant of the tenant in possession on the premises, which were locked up, and nobody in them, except the servant, who had the keys of the premises, the declaration having been served on the servant under nearly the same circumstances. *Doe dem. Atkins v. Roe.* 184
30. Rule *nisi* granted for judgment against the casual ejector, where it appeared from circumstances that the parties understood the contents of the declaration, though the affidavit did not state that it was explained to them. *Anon.* 184
31. Rule *nisi* granted for judgment against the casual ejector, where the declaration was pushed through an iron grating to the defendant, who was in Newgate. *Wright ex dem. Bayley v. Wright.* 185
32. Judgment against the casual ejector, where the declaration was put on a table before the defendant, but could not be delivered to him, as the defendant's son prevented the person from serving it. *Anon.* 185
33. Judgment granted against the casual ejector, where the declaration was not read over or explained to the tenant in

possession, on whom it was served, but who subsequently acknowledged that he had received it, and knew what it was.

Doc dem. Thompson v. Roe. Page 186

31. The court will, in the first instance, only grant a rule *nisi* for judgment against the casual ejector, where the motion is grounded on an affidavit of the defendant's acknowledgment that he had endeavoured to avoid the service of the declaration. *Anon.* 186

35. The court will, in the first instance, only grant a rule *nisi* for judgment against the casual ejector, where the defendant's attorney has acknowledged the receipt of the declaration from his client. *Anon.* 187

36. Service of a declaration in ejectment on a servant of the tenant in possession, the latter having afterwards acknowledged the receipt thereof, is sufficient; but the affidavit to ground the motion for judgment should state when such acknowledgment was made. *Anon.* 187

37. The plaintiff in ejectment on a vacant possession should proceed more regularly than in a contested possession; and if, in such a case, having obtained judgment, he should neglect to take away the rule before the expiration of two days after the term in which the rule was obtained, the court will not, in the next term, assist him. *Anon.* 188

38. In country causes, though declaration served before *Michaelmas* Term, the court will permit plaintiff in *Hilary* Term to have judgment against casual ejector. *Doc ex dem. Stott v. Roe.* 189

39. Though notice to appear was in *Easter* Term, a rule absolute in first instance for judgment against casual ejector may be moved in *Trinity* Term. *Anon.* 189

40. It is too late to move for judgment against the casual ejector in *Trinity* Term, when the notice to appear was in the preceding *Michaelmas* Term. 190

ELECTION.

See MANDAMUS, 11.

ELEGIT.

See SCI. FA.

ENLARGEMENT OF WRITS, &c.

See EVIDENCE, 2. RULES, 3.

ENTRY OF CAUSE FOR TRIAL, &c.

See STRIKING OUT PLEAS, &c. 3.

ERROR.

See BAIL, 21, 64, 65.

1. The court will not allow a party to enter

up judgment notwithstanding a writ of error, unless it is expressly shewn that it was brought for delay. Therefore a declaration by the plaintiff in error, that he would plague the plaintiff in the original action as much as possible, is not sufficient, because it may be by other means than by writ of error. *Pridham v. Budgett.*

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2. If a party declares that he will delay a cause, and states the means through which he will delay it, *via.* by writ of error, the court will compel him to shew good causes of error. *Anon.* 191

3. Sunday is not one of the four days in the rule to appear to the writ of *sci. fa. quare executionem non*, although it be not the last. *Goodwin v. Sugar.* 192

4. A *sci. fa. quare executionem non* may be tested before the return of the writ of error. *Breach v. Dickson and others.* 193

5. Admission by an attorney's clerk, that writ of error has been brought for delay, is not sufficient to prevent the writ from operating as a *supersedeas*. *Bygrove v. Bolland.* 193

EQUITY DAYS IN EXCHEQUER.

See BAIL, 23.

ESCAPE.

See VENUE, 3.

The jury, in an action of debt for an escape of a person in execution, must give a verdict for the whole debt. *Robertson and another, Assignee of Cottrell, a bankrupt, v. Taylor and another.* 454

ESTOPPEL.

See LANDLORD AND T. 1. PLEADING, 28.

EVICION.

See LANDLORD AND T. 4.

EVIDENCE AND WITNESSES.

See ABATEMENT, 3. ARBITRATION, 1, 3. ATTACHMENT, 2. FISHERY. CERTIORARI, 3. MASTER AND S. 1. NEW TRIAL, 12, 13. PLEADING, 17, 32. STAMP, 2. STRIKING OUT PLEAS, 1. CONVICTION, 4. BILLS OF EXCHANGE, 7. INSPECTION.

1. The date of a letter is evidence against the writer, that the letter was written where dated. *Anon.* 194

2. Though a witness prove a fact to the surprise of the other party, and though by mistake, he was not cross-examined, nor was any evidence given to contradict him or any observation made on his evidence,

- the court will not grant a new trial. *Bell v. Thompson.* Page 194
3. Rule nisi for new trial granted, where a witness was absent, and called upon a subpoena, but did not come till just as the verdict was taken. *Doe ex dem. Clarke v. Trapaud.* 195
4. A music master of a cathedral is not justified in even moderately beating a chorister for singing at a catch club, though that might be injurious to his performing in the cathedral. Evidence of the practice of other cathedrals not admissible. *Newman v. Bennett.* 195
5. If, upon a fair and diligent enquiry, an attesting witness to a deed cannot be found, evidence of his handwriting is admissible. In accounting for the absence of an attesting witness, or loss of a written instrument, general answers to enquiries, that nothing is known concerning them, are admissible in evidence, but not declarations as to particular facts, if the party making them is capable of being called. *Doe ex dem. Johnson v. Johnson.* 196
6. In an action for an assault, though the defendant has not pleaded a justification, he may extract evidence in mitigation of damages on the cross-examination of the plaintiff's witnesses. The plaintiff cannot give remote consequences in evidence as special damages. *Moor v. Adam.* 198
7. The court refused to grant a rule to examine a material witness upon interrogatories, on the trial of an action of ejectment, on the ground that he was so ill that he could not attend. *Anon.* 199
8. The court will permit interrogatories to be read on a trial of an indictment for perjury, provided the defendant consents to it. *Anon.* 199
9. The court will not direct the Master to review his taxation, because he has allowed for witnesses which were not called. *Adamson v. Noel.* 200
10. The court will not allow the expences of plaintiff's witnesses, brought too early to attend on a trial. *Anon.* 200
11. The whole expences must be paid or tendered to a witness, living at a distance, in order to ground an attachment against him for not obeying a subpoena. *Ashton and wife v. Haigh.* 201
12. In a question as to private rights, whether or not a place is parcel of a sheep walk, evidence of reputation is admissible. *Davies v. Lewis.* 201
13. A notice by the owner of premises, requiring a party in possession to leave the premises he then rented of the owner at Ladyday next, is not conclusive evidence of a demise from the testator to the party in possession. *Doe on dem. of Wilcockson v. Lynch.* 203

EXCEPTIONS IN EQUITY

See REG. GEN. 29, 30.

EXCHANGE.

See MANDAMUS, 3.

EXCHEQUER.

See BAIL, 23, 42. REG. GEN.

EXECUTION.

See BANKRUPT, 2. COMMITMENT, 2. IRREGULARITY, 10. POUNDAGE. WARRANT OF ATTORNEY, 2.

1. Where a *fi. fa.* has been issued, and goods taken under it have been sold for a part of the debt, a *ca. sa.* for the remainder cannot be issued until the sheriff has finally returned the *fi. fa.* *Wilson v. Kingston.* 203
2. Rule enlarged for time for sheriff to return writ, though there was only affidavit that a commission of bankruptcy had issued, and that the sheriff was fearful that act of bankruptcy was before levy. *Anon.* 204

EXECUTOR.

A legatee, under a bequest of wines, which arrived in the port of London in a ship, before the death of testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of testator, is not subject to the payment of the duties, the executor being bound to pay them out of the assets. *Stewart v. Denton, Administrator of Denton.* 456

EXONERATUR.

See BAIL, 61, 62, 63.

FALSE RETURN.

See SETTING ASIDE PROCEEDINGS, 2

FEES.

See REG. GEN. 12.

FELONY.

See BAIL, 72. INSPECTION, 1, 2.

FIERI FACIAS.

See BILLS OF EXCHANGE, 8. COMMITMENT, 2. REG. GEN. 13.

FINES.

Vid. REG. GEN. 17.

FINES AND RECOVERIES.

See REG. GEN. 21.

FIRE.

See ASSIGNEE OF LEASE.

FISH (CONVICTION FOR KILLING).

See CONVICTION, 3.

FISHERY.

The owner of a several fishery is, *prima facie*, the owner of the soil. An act of parliament authorizing persons to repair and cleanse a navigable river, does not authorize them to make a passage to a new wharf on the river. *Partheriche v. Mason and another.* Page 658

FORCIBLE ENTRY.

See PLEADING, 18.

FOREIGN ATTACHMENT.

In a plea of foreign attachment, it is necessary to aver that the garnishee resided within the jurisdiction of the mayor's court. *Qu.* If it is not also necessary to aver, that the defendant, in action in mayor's court, had notice of the custom, and of the attachment against garnishee. *Tam and another v. Williams and another.* 438

FORFEITURE.

See LANDLORD AND TENANT, 3.

FRAUD.

See ARBITRATION, 1. MANDAMUS, 10. PLEADING, 3. VENUE, 2.

FRAUDS (STATUTE OF).

See GUARANTEE.

FREIGHT.

See CHARTERPARTY.

1. Where plaintiff, by a charterparty dated 1st March, let to defendant a ship to freight, and by the terms of the charterparty, the plaintiff was to carry an outbound cargo of goods (not prohibited by restraint of princes), from *Liverpool* to *Carolina*, in *America*, and to bring back from thence a cargo for defendant, defendant paying freight for the same; and plaintiff cleared out on the 22d of March from *Liverpool*, with a cargo of salt, and on the 22d May following arrived at *Carolina*, where the importation of British goods was prohibited by an order issued the 1st of March, the very day the charterparty was dated; and also a further order prohibiting the exportation of goods to

England, so that the plaintiff could not unload the salt, or bring back a cargo of rice; held, that the plaintiff could not recover for freight homewards, if it could be established in evidence that he knew of the prohibition at the time of the ship's clearance from *Liverpool*. The fact of the plaintiff having such knowledge must necessarily depend upon the circumstances of the case. *Qu.* What will amount to a sufficient abandonment of a voyage between parties to a charterparty. *Heslop v. Jones.* Page 550

2. A charterparty, whereby the owners let a vessel to freight by the month, for such time as she should be taken up in performing a voyage from *London* to *Plymouth*, the island of *Grenada*, and from thence back to *London*, on the terms that the owners should receive, and the freighters should load and unload a cargo at *Grenada*, on such outward and homeward voyage, is to be construed to mean as two distinct voyages, from *London* to *Grenada*, and from thence back to *London*, and not as one entire voyage; and the vessel having unladed a cargo at *Grenada*, and loaded another, but on her return to *London* was, with the cargo, entirely lost; it was held, that the owners were entitled to freight for the voyage to *Grenada*. *Mackrell v. Simond and another.* 666

FRIENDLY SOCIETY.

See PLEADING, 23.

GAME.

See NEW TRIAL, 10. CONVICTION, 5.

GOLDSMITHS' COMPANY.

See COMMITMENT, 2.

GRAND SESSIONS (COURT OF) IN WALES.

See SETTING ASIDE PROCEEDINGS, 5.

GRAVEL.

See TRINITY HOUSE.

GUARANTÉE.

See SURETY.

1. A memorandum written by a clerk of the plaintiff, in the presence of the defendant, that the defendant had called to say, that he would be responsible for the plaintiff, is not a sufficient undertaking within the statute of frauds. *Dixon v. Broomefield.* 205

2. A guarantee for payment for coals to 50/ for which defendant would be answerable

at any time, is not a continuing guarantee.
Bovill v. Turner. Page 205

HABEAS CORPUS.

See COMMITMENT, 1. DECLARATION, 5.
BAIL, 66.

The House of Commons having voted the defendant guilty of a breach of their privileges, for publishing a libel upon the House, and having ordered him to be committed to Newgate during their pleasure, and the Speaker's warrant being returned into this court upon a *habeas corpus*, sued out by the defendant, the court refused to discharge him out of custody. The writ of *habeas corpus*, whether at common law or under the 31 C. 2, s. 2, does not issue as a matter of course in the first instance, upon application, but must be grounded upon affidavit, upon which the court are to exercise their discretion, whether the writ shall or shall not issue.
The King v. Hobhouse. 207

HANDWRITING.

See EVIDENCE, 5.

HAWKERS AND PEDLARS.

See CONVICTION, 4.

A person buying books in sheets, and making them up, and then going from London into the country and selling them, is within the Hawkers and Pedlars' Act, and is not exempted from penalties, as the maker of the goods. *Moore, q. t. v. Edwards.* 213

HEARSAY EVIDENCE.

See EVIDENCE, 5, 12.

HIGHWAY.

An indictment against a parish for not repairing, will not be quashed on an affidavit that the way is now in repair, but defendant must plead guilty, and pay a nominal fine. *Rea v. Lincombe and another.* 214

HOLIDAY.

See ERROR, 3.

HORSE STEALING.

See BAIL, 72.

HOTEL KEEPER.

Seemle, an hotel keeper is subject to the same liabilities as an innkeeper, and he

should be declared against as an innkeeper. *Jones v. Osborn.* Page 484

HOUSE OF COMMONS.

See HABEAS CORPUS.

HUSBAND AND WIFE.

See BARON AND FEME.

ILLEGAL CONSIDERATION.

See CONSIDERATION. PLEADING, 32.
TRADE, 1, 2. OFFICE, SALE OF.

ILLNESS.

See BAIL, 66. EVIDENCE, 7.

IMPARLANCE.

The court will not grant a special imparlance, except to prevent injustice. *Crook v. Piat* 214

INCLOSURE ACT.

See MANDAMUS, 2.

Inclosure act, authorizing commissioners to make roads through inclosed lands, and declaring that the commoners of inclosed lands shall be entitled to the herbage of the roads in that manner which the commissioners shall award, does not authorize them to sell the herbage by auction, or otherwise, to one individual commoner.
Raimes v. Robinson. 501

INDEMNITY.

See COVENANT.

1. A bond conditioned to save harmless *A.* from all actions, legal proceedings, and costs, &c. which may be the consequence of *A.*'s delivering over to defendant a bill of exchange, part of the proceeds whereof a third person is entitled to, is forfeited, by payment over by *A.* to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action, and though *A.* give no notice of the payment of the defendant. *Ker v. Mitchell.* 487
2. Under a bond, conditioned that if *F. M.* shall duly account for all monies, &c. received by him in plaintiff's service, as a clerk; and also, that if the said *F. M.* shall embezzle, &c. plaintiff's property, and shall, within three days after proof thereof repay &c. plaintiff the damage sustained by such misbehaviour or misdoing, or in default thereof, if the defendant shall, after notice given, make a full recompence to plaintiff, then the bond to be

void. The plaintiff, in order to render the defendant (the surety) liable for *F. M.*'s not accounting, must give the defendant notice thereof, as by the construction of the condition, the notice must be given for *F. M.*'s not accounting, as well as for his embezzling. *Phillips v. Fordyce*. Page 676

INDICTMENT.

See CERTIORARI, 1. COSTS, 15. HIGHWAY. NEW TRIAL, 14. PLEADING, 18. VIEW.

1. The court is reluctant to stay judgment on an indictment for not repairing a bridge. They will not stay it generally, but only till further order; and if trial of another indictment not proceeded in with all dispatch, judgment will be given. *Rex v. Inhabitants of the County of Southampton*. 215
2. It is no reason for changing the *venue* in an indictment for a conspiracy to destroy foxes and other vermin, that the gentry of the county in which the indictment was found, are addicted to foxhunting. *The King v. The Rev. Joshua King and another*. 217

INFANT.

See AMENDMENT, 1. COSTS, 8. PROCEIN AMI.

INFERIOR COURT.

See MANDAMUS, 1.

INNKEEPER.

See BANKRUPT, 4. HOTELKEEPER.

INQUIRY.

1. Motion to set aside an inquisition for excessive damages, must be made on affidavits, to be produced at the time the rule is granted. Therefore where such a motion was made on the last day of term, without affidavit, and the rule was afterwards drawn up on an affidavit sworn before a judge in vacation, the court in this term discharged the rule with costs. *Williams v. Reeves*. 216
2. It seems that a notice of executing a writ of inquiry in this court can be continued or countermanded but once, the K. B. concurring with C. P. as to the practice; but where several notices and countermands of enquiry had been served, and at length there was a fresh, and not a continuing notice served, it was held that the inquisition under it was regular. *Burgess v. Royle*. 220

INROLLMENT.

See CORPORATION, 1.

INSOLVENT DEBTOR.

See BAIL, 63. PRISONER. TREASURER OF COUNTY.

1. Discharge under the insolvent debtors act, 53 G. 3. c. 102, does not bar an action of trespass, where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before the discharge. *Lloyd v. Neale*. Page 222
2. A commissioner of the insolvent court has power to have the insolvent debtors brought before him, by a rule or order of, and signed "By the Court," but not if signed by the commissioner. *Anon.* 225
3. It is no objection to a note given to an insolvent debtor, that it is not entitled in the court. *Clarke v. Davis*. 226
4. An insolvent is entitled to be discharged, though he has proceeded irregularly, if he makes an affidavit of ignorance. *In re Jones*, an insolvent. 226
5. A debt depending upon a contingency at the time of a party's discharge under insolvent act, 18 G. 3. c. 52, is not thereby discharged.—*See* the statute of 1 Geo. 4, c. 119, which has not been referred to in this case, and which settles the law on this point. *Hilton, Administratrix of Wilton v. Worrall*. 448

INSPECTION OF DEEDS, &c.

See PARISH AND P. QUO WARRANTO, 1.

1. Where the plaintiff, in an action on a deed, has had the same taken from him under a warrant against him for felony, the court will, on an affidavit of demand upon the magistrate and constable, direct them to give plaintiff a copy to declare on, and to produce the deeds on the trial, plaintiff undertaking to pay expences. *Harris v. Aldrit*. 229
2. Rule absolute to magistrates and constables to produce deed of felon in their custody, on paying expences. 230
3. Rule for inspection of a lease, in order to obtain names of witnesses to subpoena them. *Anon.* 230
4. The court will confine their order for inspection of a deed to particular parts of it. *Ramsbottom v. Cooper*. 231

INSURANCE.

Underwriters are not entitled to notice of the part of ship where goods are stowed, whether on deck or otherwise, though goods were oil of vitriol, and different freight is payable according to the place where stowed. *Dacosta v. Edmunds*. 227

INTEREST.

See LANDLORD AND TENANT, 1.

Court will not grant a rule to compute in-

terest on a judgment in an action upon a bill of exchange. *Bishop v. Best.*

Page 233

2. Interest recoverable in an action of debt. *Semb.*, particularly where there is a covenant for interest, and at all events, would be given as damages for detention of the debt. *Semb.* The demand of principal and interest by the declaration, is divisible. *Ferney v. Iddings.* 234

INTERROGATORIES.

See EVIDENCE, 7, 8.

IRISH MONEY.

See AFFIDAVIT, 5.

IRREGULARITY.

See BARON AND F. 1. COSTS, 1. DECLARATION, 1, 2, 3. INSOLVENT DEBTOR, 4. PROCESS.

1. Irregularity in process, on the ground of a variance between the return of the writ and the day in the notice to appear, cannot be taken advantage of after plaintiff has filed common bail, and also filed a declaration in the office, and given notice thereof to the defendant. *Hampay v. Kenning.* 236
2. Where the defendant laid by until he received notice of executing a writ of enquiry, and then came with a formal objection to the declaration delivered *de bene esse*, the court said he came too late. *Minster v. Coles.* 237
3. Proceedings set aside for irregularity, where no *latitat* was issued, notwithstanding three terms' delay in moving the court. *Anon.* 237
4. It is not necessary to use the term 'irregularity' in a rule to set aside the proceedings for irregularity. An irregular notice at the bottom of the copy of a writ, is not a ground to set aside the writ, but only the copy. *Harvey v. Bennett.* 238
5. No date to the notice of the declaration is necessary. *Anon.* 238
6. A statute, making the process on which the attorney's name and date are not indorsed, actually void. It is no objection to a motion to set it aside, that it has been made too late. *Mullett v. Alexander.* 239
7. Improper names of clerks on an old copy of a writ, are immaterial. *Anon.* 239
8. *Nil debet* to an action of debt on a judgment, though a bad plea, is not to be treated as a nullity. *Anon.* 239
9. Wrong name in process cured by an attorney's undertaking to appear. *Lowes v. Newcombe Clarke.* 240
10. Irregularity in issuing an execution for

damages and costs in original action, omitting costs in error, cannot be objected to. *Anon.* Page 240

11. Rule to produce the record supported, where a perfect issue was taken, and no costs given where the rule was opposed in the first instance. *Anon.* 241
12. The order in the margin of the paper book is peremptory, and it must be returned within the 24 hours; and though it be returned before judgment signed, yet the judgment is regular if signed after the expiration of the 24 hours. *Simmons v. Cope.* 242

ISSUES.

See APPEARANCE, 3.

ISSUE FROM CHANCERY.

See NEW TRIAL, 6.

JOINDER OF ACTIONS.

See PLEADING, 37.

JOINT TENANTS.

See PARTNERS. EJECTMENT, 12, 13, 14

JUDGMENT.

See AMENDMENT, 3. ANNUITY, 1. BARON AND FEME, 1. BILLS OF EXCHANGE, 1. EJECTMENT, 34, 39, 40. ERROR, 1. IRREGULARITY, 12. REG. GEN. 13.

1. Where a special cause had been standing in the paper for three years, without any appointment applied for to have it tried, the court refused to give the defendant judgment as in case of a nonsuit. *Rucker v. Ansley.* 243
2. Where issue joined, and there is a rule to enter the issue, and notice of trial is given in one and the same term, for the adjourned sittings after that term, and the plaintiff does not go to trial at those sittings, the defendant is entitled, in the following term, to judgment as in case of a nonsuit; and if no reason is assigned for not going to trial, the court will not compel the defendant to accept a peremptory undertaking. *Walter v. Buckle.* 244

JUDGMENT REVERSED.

See PLEADING, 3.

JURAT.

See AFFIDAVIT, 7, 8, 9.

JURISDICTION.

See CERTIORARI, 2. SESSIONS. SETTING ASIDE PROCEEDINGS, 3, 4, 5.

JURY.

See NEW TRIAL, 2. WARRANTY.

JURYMAN.

See NEW TRIAL, 3, 11.

JUSTICE OF PEACE.

See QUO WARRANTO, 1. NOTICE OF ACTION. PLEADING, 41.

JUSTIFICATION OF BAIL.

See BAIL. REG. GEN. IN PLEADING, *see* PLEADING, 6.

KING'S BENCH PRISON.

See REG. GEN. 12, 4.

KING'S SERVANTS.

See ARREST, 1, 2, 3.

KING'S SILVER OFFICE.

See REG. GEN. 17.

LACHES.

See DECLARATION, 1. IRREGULARITY, 1, 2. PROCEIN AML.

LANDLORD AND TENANT.

See BANKRUPT, 3. TRESPASS, 1, 2. DISTRESS. PLEADING, 11, 16, 42. EVIDENCE, 13.

1. An agreement to take interest on rent in arrear, does not take away the right of distress. *Sherry v. Preston.* Page 245
2. Manure is assignable by the tenant, though he thereby subjects himself to an action. *Burbugo and another v. King.* 246
3. Where there is a proviso in a lease, that upon nonpayment of rent by the lessee, the term should cease, the lessor, and not the lessee, has the option of determining the lease upon the breach of such promise. *Reid v. Parsons.* 247
4. In a breach of covenant on defendant's demise for not having title to demise for the whole of the term demised, whereby plaintiff's assignee of the lease was evicted, and plaintiff put to costs in an action against him by such assignee for such eviction, plaintiff must shew who evicted the assignee; and merely stating that a third person was seised in fee of the premises; and that the assignee was evicted generally, is not sufficient. *Scrabbl.* Under the word "demise," the lessee may maintain an action of covenant against the lessor, for

not having sufficient power to demise for the whole term, whereby plaintiff was put to expence in procuring a better title for whole term. *Fraser v. Skey and others.*

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LEASE.

See PLEADING, 16.

•LEASEHOLDER.

See BAIL, 47, 48.

LEGATEE.

See EXECUTOR.

LESSOR AND ASSIGNEE.

See ASSIGNEE OF LEASE.

LESSOR AND LESSEE.

See LANDLORD AND TENANT. BANKRUPT, 3.

LIBEL.

See CRIMINAL INFORMATION, 1. HABEAS CORPUS. PLEADING, 1.

LIEN.

A dyer has a lien upon an article delivered to him to be dyed, only for the particular price of dying that article, and not for his general balance. *Bennett v. Johnson.* 455

LIMITATIONS (STATUTE OF).

See AMENDMENT, 7.

Subsequent admission of having committed a trespass, will not take the case out of the statute of limitations. *Hurst v. Parker.* 249

LORDS' ACT.

See PRISONER.

LUNATIC.

See BAIL, 61. EJECTMENT, 28.

MAGISTRATES.

See JUSTICES OF PEACE. MANDAMUS, 13. NOTICE OF ACTION.

MAJOR OF TOWER.

See ARREST, 2.

MALFEAZANCE.

See MASTER AND S. 2.

MALICIOUS PROSECUTION.

See PLEADING, 15.

MANDAMUS.

See INSTECTION, 1, 2. PARISH AND P. 1.

1. The Court of King's Bench will not interfere by *mandamus* to compel a court of inferior jurisdiction to grant a new trial in a cause before it, in which alleged injustice has been done to one of the parties. *Ex parte Morgan*. Page 250
2. *Mandamus* granted to the commissioners of an inclosure act, to inquire if there is any modus. *Anon.* 251
3. In a motion for a *mandamus* the court will not grant the writ where discretion was given to the commissioners and they had exercised it, and no ground be shewn that they have done it wrongfully. "Shall and may" are only imperative, when the cause is for the public good or benefit. "Exchange" imports equality of interest. *Rex v. Commissioners of the Flockwold Inclosure.* 251
4. *Mandamus* refused to be directed to a dean to licence a second curate. *Anon.* 253
5. *Mandamus* lies to clergyman to replace a clerk of the parish. The affidavit for the *mandamus*, should state that the clerk was appointed for life, but it is not absolutely necessary. *Anon.* 254
6. A *mandamus* to the archdeacon to swear in the churchwarden, duly elected, absolute in the first instance. *Anon.* 254
7. If one parish officer applies for a *mandamus* against another, to concur in rate, yet writ must be against both, as well against the applicant as the other. *Anon.* 254
8. *Mandamus* to the churchwardens to deliver a vestry book to the vestry clerk, refused. *Anon.* 255
9. *Mandamus* to deliver up the keys of a church, refused. *Anon.* 255
10. Rule *nisi* for a *mandamus* to pay poor rate, though defendants had had distrainable goods, it being sworn that the goods were fraudulently seized, and that the parish would be driven to try an action on the ground of the fraud. *Rex v. The Company of the Proprietors of Margate Harbour.* 256
11. The court refused to fix any day for an election, on a *mandamus*; they left it to the proper officer. *Rex v. The Mayor of Bridgwater.* 256
12. Court will grant rule absolute in the first instance, where a mayor holds over, or where actual vacancy occasioned by death. *Rex v. Mayor of Truro.* 257
13. *Mandamus* to magistrates to summon person for not paying poor rates. *Anon.* 257
14. *Mandamus* to dismiss an appeal, refused. *Rex v. Justices of Wills.* 257

MARKSMAN.

See BAIL, 37, 38.

MARSHAL.

See REG. GEN. 4.

MASTER OF CROWN OFFICE

See REG. GEN. 6.

MASTER AND SERVANT

See EVIDENCE, 4.

1. In order to maintain an action for seduction, the daughter must be the father's servant; and though he receive part of her wages, and she is under age, yet if she is not his servant he cannot maintain the action. *Carr v. Clarke.* Page 260
2. Master liable for accident in consequence of chain stay of cart breaking when horse ran away, and damage was done for his negligence in not having the tackle good. *Welsh v. Laurence.* 262

MAYOR.

See MANDAMUS, 12. QUO WARRANTO, 6

MAYOR'S COURT.

See FOREIGN ATTACHMENT.

MEMORANDUM TO DECLARATION.

See NEW TRIAL, 7.

MERCHANTS.

See BILLS OF EXCHANGE, 11

MESNE PROFITS.

See TRESPASS.

MISDEMEANOUR.

See CERTIORARI, 1.

MISDESCRIPTION.

See BAIL, 14.

MISJOINDER.

See PLEADING, 27, 36, 43.

MISNOMER.

See ABATEMENT, 4. ATTACHMENT, 1
BAIL, 13. PLEADING, 33. PROCESS,
1, 7.

MODUS.

See MANDAMUS, 2.

MONEY HAD AND RECEIVED.

The plaintiff, to recover his share of a

stake from a stake-holder, must shew his exact proportion. *Robson v. Andrade*. Page 263

MONEY LENT.

See PLEADING, 27.

MONEY PAID INTO COURT.

See BAIL, 1.

MONOPOLY.

See CRIMINAL INFORMATION, 2.

MORTGAGOR AND MORTGAGEE.

Rule granted for delivering up mortgage deeds on payment of debt, interest, and costs, in an action of covenant. *Anon.* 264

MOTIONS.

See AFFIDAVIT, 2. INQUIRY, 1. REG. GEN. 27.

1. A rule once disposed of after full argument, cannot be opened again upon a suggestion that new matter has since come to the knowledge of the party, which would alter the decision of the court. *Phillips v. Weyman.* 265
2. The court will not grant a second rule to set aside an award, when a rule for that purpose has already been discharged. *In re Hellyer and Snook.* 265
3. The court will not, at the close of the term, grant a rule nisi to shew cause at chambers, where the party could have come earlier. *Anon.* 266

MUSIC MASTER OF CATHEDRAL, &c

See EVIDENCE, 4.

NAVIGATION ACT.

See FISHERY.

NEGLIGENCE.

See MASTER AND SERVANT, 2.

NEW TRIAL.

See AMENDMENT, 6. EVIDENCE, 2, 3. MANDAMUS, 1. WARRANTY.

1. A client is bound by the conduct of his advocate, and the court will not grant a new trial, on the ground that the witnesses were not examined by counsel, according to the request of the attorney. *Hall v. Stothard.* 267

2. An admission by jurymen, made after they have separated, though on the day of trial, is not a sufficient ground for a new trial. *Davis v. Taylor.* Page 268
3. New trial granted on terms that costs should abide the event, where verdict of jury was perverse. *Hodgson v. Barris.* 268
4. That indictment for perjury found against witnesses, who gave evidence, is no ground for court to grant new trial. *Pott v. Parker.* 269
5. New trial for defendant, on affidavit of surprise, and on terms. *Greatwood v. Sims.* 269
6. Where an issue was from Chancery, the motion for a new trial may be made in this court, the judge on the trial having given leave to move. *Holwerthy v. Richards.* 270
7. New trial granted on payment of costs where plaintiff was nonsuited, on the ground that there was no special memorandum, and the writ was not in court to prove the commencement of the action, and the cause of action accrued after first day of term. *Smith v. Cuff.* 271
8. Contradiction of witnesses is not alone a sufficient ground for a new trial, although the judge directed the jury contrary to their finding. *Sprague v. Michell.* 271
9. Defendant cannot move to enter a nonsuit, unless leave be given at the trial, and can move only for a new trial. But if the judge refused leave at the trial, because he thought it would be unnecessary, he will put the party on the same footing as if the leave had been given at the trial. *Gates v. Ryan.* 271
10. When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions has been abandoned. *Semble, A conveyance of land, in order to give a qualification to sport, is valid, and conveys a qualification. Doc dem. Roberts v. Roberts.* 272
11. After a verdict for the defendant in a penal action, the court will not grant a new trial where the verdict was contrary to the judge's direction, and founded on a mistake, if there has been no misconduct in the jury. *Ranston v. Elteridge.* 273
12. Where lands were granted in the occupation of a particular person, who had been dead two years before the making of the grant, and the jury found that the intention was to grant certain lands, but the words were not sufficient to express that intention, the court held the verdict right. When extrinsic evidence is admissible to explain a deed. *Beaumont v. Field.* 275
13. Affidavits of fresh facts are not in general admissible in criminal cases, on a motion for a new trial, unless there was

some surprise on the defendant at the trial. Affidavits of the death of a person may be received to account for his not being examined. *The King v. Bowditch and others.* Page 278

14. Though the court will not grant a new trial on an indictment, where the verdict was given for the defendant, yet it will stay the entry of judgment on a former verdict, to prevent the plea of *autre fois acquit* on a fresh trial. *Rex v. Inhabitants of Wandsworth.* 282

NEGLIGENCE.

See PLEADING, 17. MASTER AND SERV.

NIL DEBET (PLEA OF).

See IRREGULARITY, 6

NON EST FACTUM.

See COVENANT. SET-OFF

NONFEAZANCE.

See PLEADING, 17.

NONJOINDER.

See ABATEMENT, 1. PLEADING, 40.

NON PROS.

See APPEARANCE, 4. POUNDAGE.

Before the defendant can sign judgment of *non pros.* he must take out a rule to reply, as of the term in which the judgment is signed; but where, after repeated applications made to him for the replication without effect, and after orders obtained for time to reply, the defendant signed judgment of *non pros.* without taking out a rule to reply as of the term in which judgment was signed, the court refused to set aside the proceedings otherwise than on the terms of the costs being costs in the cause. *Brook v. Lawrence.* 283

NON RESIDENCE (ACTION FOR).

See VENUE, 7.

NONSUIT.

See AMENDMENT, 7. JUDGMENT, 1, 2. NEW TRIAL, 9.

NOTICE OF ACTION.

See TURNPIKE ACT, 2.

A magistrate is entitled to notice of action under the 24 Geo. 2, c. 44, s. 1, when he

acts as a magistrate, though what he does is not strictly within the scope of his office. *Bird v. Gunston.* Page 459

NOTICE OF BAIL.

See BAIL, 15, 16, 19, 25 to 33, 69.

NOTICE IN EJECTMENT.

See EJECTMENT, 3 to 10, &c.

NOTICES FOR OTHER PURPOSES.

See BILLS OF EXCHANGE, 3. INQUIRY IRREGULARITY, 5. PROCESS, 1, 7. SURETY. INDEMNITY, 2. TO QUIT, see EVIDENCE, 13.

NUISANCE.

See INDICTMENT.

NUL TIEL RECORD.

See AMENDMENT, 5.

OFFICE (SALE OF).

The office of private secretary does not fall within the meaning of the 5 & 6 Edw. 6. So an assignment of all offices which the defendant might acquire, is legal, as it will be taken to mean, of all offices that may be legally assigned. *Harrington v. Klop-rogge.* 475

OFFICER.

See CONSTABLE. — PARISH, see MANDAMUS, 7.

ORDER OF JUDGE.

See BAIL, 20. PLEADING, 3.

ORDER OF SESSION.

The binding an apprentice to a *fenu covert* void. Where only one question is submitted to the Court of King's Bench by the sessions, the court will not consider any other questions. *Rex v. Guildford.* 284

ORIGINAL, PROCEEDINGS BY.

See COSTS, 3.

OVERSEERS.

1. A commitment under 50 G. 3, c. 49, s. 1, of the late overseers, for not delivering up the parish books, should specify what the books are. *Graver v. Farrerster.* 286
2. Overseer, who has been committed for not delivering his account, and paying over the balance due, may be discharged.

if he have become bankrupt and obtained his certificate, although he became bankrupt before the expiration of the year for which he acted. *Rex v. Tucker*, overseer of the parish of *Harbut*, Devonshire.

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PAPER BOOK.

See IRREGULARITY, 12.

PARISH AND PARISHIONER.

See MANDAMUS, 7.

1. A parishioner has no right to inspect parish books for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish, and therefore the court refused a *mandamus* for that purpose. *The King v. Smallpiece and others*. 288
2. Rule for an inhabitant of a parish to inspect the parish books, may be absolute in the first instance. *Anon.* 290

PARISH BOOKS.

See OVERSEERS.

PARTIES TO ACTION.

See PARTNERS, 2. EJECTMENT, 1, 2. SETTING ASIDE PROCEEDINGS, 1. TRESPASS, 1, 2.

A party cannot be both plaintiff and defendant in an action at law; and therefore where plaintiff sued as executor, and defendants pleaded that the promises in declaration were made jointly with plaintiff, the court held this a good plea in bar of the action. A plea in abatement, in proceedings by bill in the K. B. concluding with prayer that declaration be quashed, is bad. *Moffatt and another*, Executors of *Poynting*, v. *Tan Mullingen and others*. 539

PARTNERS AND PARTNERSHIP.

See BILLS OF EXCHANGE, 2, 3, 11. EJECTMENT, 12. PLEADING, 37.

1. If an indenture of partnership for a term of years contains a proviso, that either party may, if he be desirous of quitting the trade, determine the partnership by giving six months notice; he cannot dissolve the partnership, and then set up a trade elsewhere, but must either continue the partnership, or entirely give up such trade. *Cooper v. Watlington*. 451
2. The payment of money to defendant's use by a solvent partner, out of his separate property, after the bankruptcy of

his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. And where the plaintiff and the bankrupt, before the bankruptcy, being partnership brokers, effected an insurance for defendants, and the receipt of the premium was acknowledged in the policy at the time of effecting such insurance, but which was not in fact paid until after the plaintiff's partner's bankruptcy, by the plaintiff, out of his own separate property, the principal insured was held liable to the solvent partner only. *Thacker v. Shepherd and others*. Page 652

PAUPER.

See SESSIONS.

PAYMENT.

A direction by a debtor to his bankers, who were indebted to him in a larger amount, to place to the credit of his creditor (who was a debtor to the bankers), for goods sold, a sum of money, so as to make the same as a bill at one month, which the bankers consented to do, but who only considered it as a payment to be made at a future day, does not amount to a payment; and in a case of this nature, where the bankers became bankrupts before the day on which the credit would expire, it was held the debtor was not discharged by such payment. *Pedder and others v. Watt and another*. 619

PEDLARS.

See HAWKERS AND PEDLARS.

PENAL ACTION.

See NEW TRIAL, 11. SETTING ASIDE PROCEEDINGS, 1. VENUE, 7.

PERFORMANCE.

See PLEADING, 43.

PERJURY.

See NEW TRIAL, 4. VIEW.

PETITION.

See REG. GEN. 28.

PLEADING.

See BAIL BOND, 2. DECLARATION. EJECTMENT, 7, 9. EVIDENCE, 6. INTEREST, 2. IRREGULARITY, 8. NEW TRIAL, 7, 14. IN EQUITY, see REG. GEN. 29. SET-OFF, 2. REPLY.

1. The declaration having in the first and

- second counts, alleged "the composing and publishing of two libels," the defendant, in his pleas of justification, stated "that the libels so set forth were one and the same supposed libel, and not other or different supposed libels;" held on demurrer, that the pleas were bad on this ground. *Edmonds v. Walter and another*. Page 291
2. If a defendant obtains leave to amend his pleadings on payment of costs, it does not seem to be a necessary term, under the words 'usual terms,' that he should be prepared to go to trial at the ensuing sittings after the then term.
3. After the defendant had obtained an order for staying proceedings, upon paying the debt and costs, which had been taxed, and having afterwards abandoned the order, he pleaded a judgment recovered; the court held that the plaintiff was at liberty to sign judgment, the plea filed being a fraud upon the judge's order. *Hill v. Dyball*. 292
4. A general demurrer must be delivered; filing will not do; and the plaintiff may sign judgment when it has been only filed. *Troy v. Champneys*. 295
5. The plea of *plene administravit* must be delivered, and not filed. *Kent v. Monk*. 295
6. Replevin plea in bar, "that long before the said time when, &c. to wit, on &c. at &c. defendant demised the *locus in quo* to plaintiff;" and replication, "that long before the said time when, &c. to wit, on &c. at &c. defendant did not demise *modo et forma*," on demurrer, that the replication contained an immaterial traverse and negative pregnant: held, that the words "before the said time, &c." were the material part of the traverse; and proof of a demise at any time before the distress, would maintain the action; and that the day and place subsequently mentioned were immaterial; and that consequently the replication was sufficient. *Coff v. Coster*. 296
7. The allegation of a right of common for all the party's cattle, *levant and couchant*, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time. *Willis v. Ward*. 297
8. The plaintiff may suggest breaches in an action on a bond (8 and 9 *Wm. 3. c. 11*, s. 8,) at the conclusion of his replication. *Humphrey v. Rigby*. 298
9. Where a declaration contained, besides the usual money counts, the *indebitatus* and *quantum meruit* counts, for work and labour as an attorney, and two similar counts for work and labour generally, the court referred it to the Master to strike out the latter for superfluity, before the issue was made up. *Gabell v. Shaw*. Page 299
10. It is not necessary to set out the date of a bill, its delivery is its date; and it is a sufficient averment of nonpayment of a bill accepted, payable at *A. B.*'s, to state that it was presented at their house, without shewing it was to him. *Giles v. Bourne*. 300
11. Plea of distress taken to action for use and occupation, no answer, unless stated how long retained, or that it was legally taken. *Deane v. Edmonds*. 301
12. Plaintiff in ejectment permitted to amend his declaration on payment of costs, by adding a new count on another demise, after three terms had elapsed, and the roll had been made up and carried in. *Doan dem. of Beaumont v. Armitage*. 302
13. *Assumpsit* on several promises. Plea to the whole declaration, that a pipe of wine was given in satisfaction of the cause of action, held bad on special demurrer. *Hopkinson v. Tahourdin and another*. 303
14. The taking a debtor in execution on a judgment, may be replied to a plea of set-off on such judgment. *Taylor v. Waters*. 303
15. Falsely, maliciously, and without any probable cause, procuring the warrant of a justice to search the premises, and apprehend the person of *A.* on suspicion of felony, and thereby causing his premises to be searched and his person imprisoned, is properly the subject of an action of the case, and not trespass. A positive oath, that a felony is actually committed, is not necessary to justify a magistrate in granting his warrant to search the premises and apprehend the person of a party suspected of felony; and though it may be trespass in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who comes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause. *Else v. Smith (in error)*. 304
16. A declaration in covenant, at the suit of the executor of a termor, for a breach of covenant after the death of the termor, should state the termor's interest and title in the premises; and where a declaration stated that *A. B.* demised premises to the testator of the plaintiff (*viz.* the termor, without stating that *A. B.* was seised in fee, or of any other estate), and that the plaintiff's testator demised them to *C. D.* and stated a breach of covenant after plaintiff's testator's death, it was held bad. Where a lessee has power to renew his term, upon giving six months notice of his intention before its expiration, and upon

his preparing a fresh lease, &c. he cannot, though he give notice of such his intention, demise the premises to another party beyond the expiration of the first term, unless he prepare such fresh lease, and get it, or endeavour to get it executed.

An executor of a lessor, tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death. *Mackay, Executor of Durno, v. Mackreth, Administrator of Shelly, Assignee of Shelly.*

Page 461

17. In an action against an attorney for non-feasance, in not looking sufficiently into a title, it is sufficient to state that he was retained as attorney, without stating the consideration. If diligence would have been ineffectual, the defendant must prove it. If declaration state the defendant was an attorney of a particular court, the plaintiff must prove it, though the defendant put in his plea as such. *Bourne v. Digges and another.*

311

18. An averment in an indictment for forcible entry, merely that the prosecutor was "seised," is sufficient to found an application for a writ of restitution; and it need not be shewn by prosecutor that he still continues seised. *Rex v. Dillon and others.*

314

19. Trespass for driving against plaintiff's cart; it is an immaterial allegation who was riding in it. *Howard v. Peete.*

315

20. The first count of a declaration in covenant, for not performing an award, by paying money awarded; second count, for revoking power of arbitrators. Plea to first count, revocation by deed of the authority of the arbitrators before they made their award: held on demurrer, that this plea was a sufficient answer to the breach of covenant. The second count was on demurrer held sufficient, on the ground that an allegation, that the defendant by deed revoked the arbitrator's power, imported an effectual revocation, and therefore imported that the arbitrators had notice of the revocation. *Marsh, Executor of Wm. Quinlan, v. Bultell.*

316

21. Counsel's signature to plea must distinctly appear at the foot of the plea, as well as in the rule to plead several matters. *Grant and others v. —.*

319

22. Where there is a special agreement, and it is conditional, the plaintiff must declare specially; and if the plaintiff affirms that the agreement was cancelled, he must prove that it was acquiesced in by the defendant. *Davis v. Nichols.*

320

23. Debt on a bond given to plaintiff as treasurer of a friendly society. Plea that

the rules of the society had not been duly confirmed at sessions, pursuant to 33 G. 3. c. 54; held, upon demurrer, that the plea was bad. *Jones v. Woollam.*

Page 322

24. Though the original action was for damages, it is not demurrable in a replication in *scire facias* against bail to pray judgment of debt and damages. *Roe v. Roe.*

322

25. A plea *puis darrien continuance*, of a release by one of the lessors of the plaintiff, is bad on general demurrer, and the court would not give leave to amend. *Doe ex dem. Byne v. Brewer.*

323

26. A contract to satisfy a debt, by providing a cargo of wine, must be declared on specially; and an action will not lie for the old debt. *Hoppe, Executor, v. Symonds.*

324

27. In general, assignees of a bankrupt cannot lend; but as they may lend under circumstances by the 5 G. 2, c. 30, s. 32, counts may be joined for debts due to the bankrupt, and for money lent by the assignees as such. *Richardson v. Griffin.*

325

28. Covenant not to release a bond assigned by defendant to plaintiff. Breach, that plaintiff commenced an action in the name of defendant against the obligor; and that defendant did not, although often requested so to do, avow and justify the said action, but on the contrary thereof executed a release to the obligor of all actions, bonds, &c. by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs and other expenses: upon special demurrer to this breach it was held, first, that the averment of request was unnecessary, and that it therefore required no *venue*, inasmuch as it appeared that the defendant had, by executing the release, disabled himself from bringing any action upon the bond. Secondly, that it was no ground of demurrer to the whole breach, that the plaintiff was not entitled to recover the special damage. *Amory v. Broderick.*

329

29. *Qu.* If a plea of plaintiff's bankruptcy since last continuance, is a dilatory plea, or a plea in bar. *Qu.* If such a plea should not set out proceedings in the bankruptcy specially, and that the plaintiff was a trader. *Hartley v. Dixon.*

561

30. If a declaration amended in the same term as delivered, though after a rule to plead be given, it is not necessary to give a fresh rule to plead; though if it is amended in a subsequent term, a fresh rule is necessary. *Barry v. Lord Rodney.*

332

31. Where bill declared on was "for value received by R. H." and the one produced

- was for, value received generally, held a fatal variance. *Higmore v. Primrose*. Page 333
32. The defendant cannot give in evidence illegality in the consideration of a bond, unless he pleads specially. *Harmer v. Row*. 334
33. Where the plaintiff's name was stated in commencement of declaration to be *James Toll Hutchins*, and the defendant demurred specially, that the plaintiff was named throughout in the subsequent part of the declaration, "said *James*" only, it was held sufficient, because *non constat*, but that "*Toll*" was part of the surname. *Hutchins v. Gilbie*. 335
34. If a special sham plea be so framed as to render it expedient for the plaintiff's attorney to consult counsel, the court will permit the plaintiff to sign judgment as for want of a plea, and make the defendant or his attorney pay the costs. *Shadbolt v. Berthoud*. 335
35. A parol agreement, giving time to a principal obligor of a bond, cannot be pleaded at law as a defence of the surety. *Davey and others v. Prendergass*. 336
36. A count, stating "that defendant had and received for plaintiff a sum of money, to wit, 10s. to be paid by defendant to plaintiff upon request; yet defendant, not regarding his duty, had converted and disposed thereof to his own use," is laid in *assumpsit*, though colourably in *trover*, and cannot be joined with counts in case; and it is demurrable generally, though the demurrer goes only to that particular count. *Orton v. Butler*. 343
37. A demand against a surviving partner as survivor, may be joined with a demand due from him, as if he were solely liable. *Golding v. Vaughan*. 436
38. Where an act of parliament in the enacting clauses creates a power to do certain acts, "except in the places herein-after mentioned," and the exceptions are only specified in succeeding clauses, the party claiming under a right derived from such power, need not negative such exceptions.

Where an act of parliament prescribes a particular remedy for an offence, it does necessarily take away the parties' remedy by action; and where an act prohibited other persons than the scavenger from carrying away dust from houses in certain places, under a penalty of 10s. to be recovered before a magistrate, it was held that the scavenger might still have his remedy for an injury in this respect by action. *Qu.* as to what is a sufficient property in a thing to maintain *trover*. *Ward v. Bird*. 582

39. A declaration in case against an Earl, stating the Earl to have been "summoned to answer," instead of "attached," is bad. *Hunter v. Earl of De Lorraine*. Page 638

40. In action of *assumpsit* for use and occupation of lodgings by *A. H.*, defendant's wife, at his request, the defendant cannot plead that *A. H.* was not his wife, as such plea would amount to the general issue, as well as tender an immaterial issue. *Sinclair v. Hervey*. 642

41. A plea, justifying slandering the plaintiff as a justice of the peace, of pocketing fines of prisoners whom the plaintiff had convicted, should state the names of the parties convicted, and of whom the plaintiff had received the fines. 665

42. A plea (to a declaration against a tenant for not using premises in husbandlike manner, in repairing fences, &c. on his implied promise so to do), that the fences became out of repair by natural decay, and that there was not proper wood (without specifying it), which defendant had right to cut for repairing the fences; and that the plaintiff ought to have set out proper wood for the purpose of repairs, which plaintiff neglected to do, without averring any request on plaintiff so to do, or a custom of the country in this respect, is bad. *Whitfield v. Weedon*. 685

43. A misjoinder of action against husband and wife, may be taken advantage of by general demurrer. *May v. House and Wife*. 697

44. A plea (to a declaration on bond, conditioned amongst other things for the payment of 3,000*l.*), that all sums of money which became due on the bond were paid, may be replied to generally, by a general denial of the words of the plea, without assigning any special breach. *Turner v. M'Namara*, Executor of *M'Namara*. 697

PLENE ADMINISTRAVIT.

See PLEADING, 5. EXECUTOR. ADMINISTRATOR.

POOR RATE.

See MANDAMUS, 7, 8, 10, 13.

POSTEA.

Where the jury, in an action of debt on 2 & 3 *Edu.* 6, c. 13, which gives treble value, for not setting out tithes, found damages which amounted only to the single value, held that the court could not amend the *postea*, by entering the verdict for the treble value. *Sandford v. Porter*; and *sane v. Clarke*. 351

POUNDAGE.

The sheriff is not entitled to poundage on execution, upon a judgment of *non pros.*
Anon. Page 353

PRACTICE.

See the respective Divisions, PASSIM; also
ABATEMENT, 4, 5. ATTORNEY, 3. DE-
CLARATION, 1, 2. INQUIRY, 1. MO-
TIONS, 1, 3. NON PROS. PLEADING,
21. STRIKING OUT PLEAS, 3.

PRINCIPAL AND AGENT.

An auctioneer, who delivered goods without receiving the price from the purchaser, was held liable, on a declaration for not giving a full account of the full produce of the goods. *Brown v. Staton.* 353

PRISONER.

See BAIL, 40, 72. COMMITMENT, 1. EJECTMENT, 31. INSPECTION, 1, 2. REG. GEN. 4, 6, 14. TREASURER OF COUNTY.

A prisoner is not to be discharged under Lords' Act, where he has before had the benefit of the general insolvent act. *Gulosis v. Longhurst.* 354

PRIVATE SECRETARY.

See OFFICE, SALE OF.

PRIVILEGE.

See ARREST, 1, 2, 3. SETTING ASIDE PROCEEDINGS, 6.

PROCESS.

See DECLARATION, 1, 4. IRREGULARITY, 1, 3, 4, 6.

1. Copy of a writ against *John Stafford*, and notice at foot to appear calling the defendant "*John Stratford*, you are served," &c. was held to be a variance of which the defendant could not avail himself on motion to set aside service of process for irregularity. *Wilson v. Stafford.* 355
2. *John* in the writ, and *Joseph* in the notice, held amendable, and therefore a rule to set aside same for irregularity was refused. *Baagett v. Lee.* 355
3. A writ having a wrong return will not be aided by a correct day being mentioned in notice to appear. *Anon.* 356

4. Date of *English* notice in figures immaterial. Writ not signed by proper clerks immaterial. King's title not material in writ. *Anon.* Page 356
5. It is not irregular to serve process even after 11 at night, process not being within the rule as to service of notice, &c. before 10 o'clock at night, but may be served at any time of the night. *Anon.* 357
6. The sheriff who knowingly arrests a man by a wrong name is a trespasser; but if he has taken a bail bond he is liable to an attachment if bail above be not perfected. *Rex v. Sheriff of Middlesex.* 357

PROCHEIN AMI.

Quare, If the Court of King's Bench will grant a rule for an efficient *prochein ami* to be appointed, and security to be given for costs. Motion is too late, after moving to put off trial. *Anon.* 359

PRODUCTION OF RECORD.

See IRREGULARITY, 11.

PROHIBITION.

1. It seems that prohibition will not lie to restrain the Court of Admiralty from taking cognizance of a suit instituted in that court by a majority of ship owners, as against an individual owner, to restore the possession of the ship's registry, in order that she may sail on her voyage. *Anon.* 359
2. Prohibition granted to an ecclesiastical court, on behalf of the plaintiff in that court, in a suit for tithes, a *modus* having been pleaded. *Hayward v. Culliford.* 362

PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES. INSOLVENT DEBTOR, 3.

PUIS DARRIEN CONTINUANCE (PLEA OF).

See PLEADING, 25.

QUARTER SESSIONS.

See SESSIONS.

QUI TAM ACTION.

See SETTING ASIDE PROCEEDINGS, 2.

QUO WARRANTO.

See SPECIAL CASE, 2.

1. The rule is absolute in the first instance, for an inspection of the corporation books, where a *quo warranto* is depending. *The King v. Travunian.* Page 366
2. Under particular circumstances, the court will suffer a disclaimer to be entered without costs. *The King v. Holt.* 366
3. *Quo warranto* against one who acted after he had resigned, by writing, but without deed. *The King v. Payne.* 367
4. *Quo warranto* for exercising the office of a justice of the peace. *The King v. —.* 368
5. Where the relator, on an application for a *quo warranto* information, is the legal adviser of the defendant, and has advised him that he was duly elected, the court will discharge the rule for the *quo warranto*. *The King v. Payne.* 369
6. Retail baker is not ineligible as mayor, though the officers of the borough settled the assize of bread there. *Rex v. Deane.* 370
7. Party admitted to defend the defendant's title. It is no objection to *quo warranto*, that it is a friendly proceeding, in order that the party might disclaim. *Rex v. Dr. Marshall.* 370
8. Rule *nisi* granted for a *quo warranto*, where continuing incompatibility, though both offices held more than 6 years. *Rex v. Lawrence and another.* 371

RATES.

See POOR RATES. MANDAMUS, 7, 10.

RECOVERIES AND FINES.

See REG. GEN. 21.

REGISTRY.

See PROHIBITION, 1.

RELEASE.

See BILLS OF EXCHANGE, 8. LANDLORD AND TENANT, 1, 2. PLEADING, 25, 28. WARRANT OF ATTORNEY, 1. DEBTOR AND CREDITOR.

RENDER.

See BAIL, 4, 5, 54, 56, 57, 60.

REMEDY.

See SETTING ASIDE PROCEEDINGS, 2. TRE-PASS, &c.

RENT.

See LANDLORD AND TENANT, 3. BANKRUPT, 3.

REPAIRS.

See ASSIGNEE OF LEASE.

REPLEVIN.

See PLEADING, 6.

The plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Qu*
Where an avowry, stating the plaintiff to have held under a demise, at the yearly rent of 317l. without stating when the rent was payable, does not mean that the rent was payable yearly. *Laycock v. Tufnell.* Page 531

REPLICATION.

See NON PROS.

RETURNS TO WRITS.

See respective heads of WRITS. EXECUTION, 1, 2. SHERIFFS, 2.

ROLL.

See AMENDMENT, 1.

RULES.

TO PLEAD AND REPLY, see PLEADING, 21, 30.—TO BRING IN BODY. SHERIFF, 3.—TO PRODUCE RECORD, see STRIKING OUT PLEAS, 2.

1. A rule at the end of the term may, by special leave of the court, be drawn up for three days. *Aum.* 372
2. Rule for a *conclium* obtained on *Saturday*, and served on the *Saturday* night, the term ending on the *Wednesday* following, is sufficient; four days are not in all cases necessary at the end of the term. *Bradshaw v. —.* 372
3. Rule obtained on *Saturday* for *Monday*, enlarged of course. 372

REGULÆ GENERALES IN KING'S BENCH.

4. To prevent the use of spirituous liquors in the King's Bench Prison, and empowering the Marshal to remove offenders therein to another prison, to be confined there for so long as Marshal shall think fit, not exceeding three months. 373
5. To prevent the setting aside a regular attachment against sheriff for not bringing in the body, or the staying proceeding on bail bond, without affidavit of merits, or affidavit that application is really made on behalf of sheriff, &c. 373

6. To discharge rule of court *Hilary Term* 57 *Geo.* 3, as to ordering Master of Crown Office to visit King's Bench Prison, and order, that all complaints of prisoners within the said prison must be delivered to Marshal or his officer. Page 374
7. Order, that notices for justifying bail in person, must be served before 11 o'clock of forenoon of the day for which notice ought to be served, except where further time to justify has been allowed, in which case notice must be served before three o'clock in the afternoon of such day. 374
8. Order, that defendant in ejectment shall specify in consent rule the premises for which he defends, and consent that on trial he will admit the possession of the premises. 375
9. Order, that in country ejectments, served before essoign days of *Easter* or *Michaelmas* terms, tenant must appear within four days after end of such term. 376
10. Order, that in rule *nisi* for setting aside award, objections to award, &c. must be stated. 376
11. Order, that if two or more notices of bail have been given before bail appear to justify, costs thereof must be paid before justification. 376
12. Order, that no officer under Marshal shall take fee for inquiry into solvency, &c. of a party intending to take the benefit of the rules. 376
13. Order, that sealer of writs shall not seal a *fi. fa.* or *ca. sa.* without judgment paper, &c. be produced to him. That attorney must, on all bailable process, writs of attachment, *fi. fa.* and *ca. sa.* indorse defendant's place of abode, &c. That to sign judgment on *cognovit*, *cognovit* must be produced to clerk of dockets, and filed with him. 377
14. Order, that no prisoner intending to take benefit of insolvent act, shall be superseded by plaintiff discontinuing to proceed in action. 377

RULES IN COMMON PLEAS.

15. Order, that in bailable causes for 1000*l.* and upwards, bail may justify in 1000*l.* beyond sum sworn to. 378
16. Order, that bail may justify at sitting of the court only, except (under circumstances) on the last day of term. 378
17. Order, that fines must be left at the Chirographer's Office fourteen days after passed; and all *indes* in King's Silver Office must be carried to Chirographer's Office. 378
18. Order, that rules for special juries must be served, and cause marked in Marshal's

book as special jury, two days before adjournment-day in *London* or *Middlesex*. Page 378

19. Order, that Seal Office lie open from eleven till two, and from five till seven, during term, and ten days after issuable term, and one week after any other, and from eleven till three in vacation. 379
20. Order, that rule for *supersedeas* of defendant out of custody of warden, &c. must be filed, upon signing *supersedeas*. 379
21. Order, that no motion relating to a fine or recovery shall be made on last day of term. 379
22. Order, that defendant in ejectment shall specify in consent rule premises for which he defends, and consent that on trial he will admit the possession of premises. 380
23. Order, that in country ejectments, served before essoign days of *Easter* or *Michaelmas* terms, tenant must appear within four days after end of such terms. 380
24. Order, that affidavit on motion to enter up judgment on old warrant, must state that defendant is alive on a day in the term. 381
25. Enabling plaintiff to declare in C. P. on process, returnable last return of the term, so as to have a plea of the term. 381

RULES IN EXCHEQUER.

26. Order, that justification of bail must be at sitting of the court before other business. 381
27. Order, that all motions in causes to be heard before Lord Chief Baron, must be made before him alone, when sitting in court. 382
28. Order, regulating the hearing of causes, petitions, &c. 382
29. Regulating hearing of exceptions, pleas, &c. in equity and law. 382
30. Exceptions must be heard at sitting of the court before motions. 383

SATISFACTION.

See PLEADING, 14, 26.

SCAVENGER.

See PLEADING, 38.

SCIRE FACIAS.

See BAIL, 62. QUARE EX. NON. ERROR, 3, 4. PLEADING, 24.

A *scire facias* is necessary, where an *elegit* is

not awarded within a year and a day after judgment obtained. Page 384

SEAL OFFICE.

See REG. GEN. 19.

SEALER OF WRITS.

See REG. GEN. 13.

SECURITY FOR COSTS.

See COSTS, 4, 5, 6, 7.

SEDUCTION.

See MASTER AND SERVANT, 1.

SERVICE.

OF PROCESS, see PROCESS, 5. OF DECLARATION IN EJECTMENT, see EJECTMENT.

SESSIONS.

See ORDER OF SESSIONS.

This court will not interfere with the practice of the court of Quarter Sessions, unless it appears to be manifestly wrong or unjust. Where an appellant parish gave notice before *Michaelmas* sessions, that they would at these sessions enter and respite, and try their appeal with effect at the following sessions; and in the mean time a negotiation had taken place with the respondents as to the settlement of the pauper, but without any determination, it was held to be necessary to give a fresh notice of appeal for the following sessions, to entitle the appellants to be heard. *The King v. The Justices of Essex.* 385

SET-OFF.

See COVENANT. PLEADING, 14. SETTING ASIDE PROCEEDINGS, 3. REPLEVIN.

1. The plaintiff being an auctioneer, and suing for the price of goods sold by him as such, the defendant may set-off a debt due to him from the principal vendor. *Jarvis v. Chapple.* 387
2. In an action of covenant the defendant must plead a set-off, and having pleaded *non est factum*, and given notice of set-off, cannot avail himself of it. *Oldershaw v. Thompson.* 388

SETTING ASIDE AND STAYING PROCEEDINGS.

See COSTS, 14. IRREGULARITY, 3, 4.

1. The consent of the party to whom the

moiety of a penalty is to be paid, he not being the plaintiff, is not necessary in prosecuting a *qui tam* action. *Smith.* Page 392

2. The court will not prevent the plaintiff from proceeding at the same time by action for a false return, and a *distringas* to make a return. *Anon.* 392
3. An action may be brought in a superior court, when the demand is above 40s. though it be reduced by a set-off. *Gobell v. Thirt.* 394
4. The Court of King's Bench will not stay proceedings merely on an affidavit that the debt was under 40s. *Culliford v. Dyche.* 395
5. Action may be brought in Court of Grand Sessions in *Wales*, for goods delivered to a carrier in *London*, but received at *Carnarvon*; and proceedings in action in *Middlesex* stayed, cause of action being under 40s. *Anon.* 395
6. The court will stay proceedings, if a defendant be sued by bill as an attorney, when he is not one. *Nabb v. —.* 396

SETTLEMENT.

See SESSIONS.

SIAM PLEADING.

See PLEADING, 34.

SHEEP WALK.

See EVIDENCE, 12.

SHERIFF.

See ATTACHMENT, 1, 4. POUNDAGE. PROCESS, 6. REG. GEN. 5.

1. Rule for an attachment against an undersheriff, on the death of the sheriff, during his year, under 3 G. 1, c. 15, s. 8, is not absolute in the first instance. *Anon.* 389
2. Attachment refused against the sheriff for not selling under a *venditionem exponas*, where he had returned, he could not sell for want of buyers. *Anon.* 390
3. Where there were three defendants, two of whom were arrested and bailed, and the plaintiff took an assignment of the bail bonds; and as to the third, the sheriff returned *non est inventus*. Under these circumstances the court discharged the rule to bring in the body. *Anon.* 391

SHIPS, SHIP OWNERS, AND SHIPPING.

See CHARTERPARTY. FREIGHT. DEMURAGE. INSURANCE. PROHIBITION, 1. TRINITY HOUSE.

1. When a consignee is not ready to receive

the cargo, and the owners of the ship, desirous to get their ship clear, unload the cargo and enter it with the excise, but erroneously, whereby they are seized; held, that the ship owners are not liable to consignees for the non delivery of the rum, as the bill of lading did not properly describe the same. *Shirwell v. Shaplock and others.* Page 397

2. Under a clause in an act of parliament, exempting ships from the payment of the same port or toll duties "more than once for the same voyage bout out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandizes;" held, that a vessel having cleared out of port at *Hull* with a cargo of goods for *Mogadore*, on the coast of *Africa*, which she discharged, and then took in another cargo for *London*, discharged the same at *London*, and took in a cargo for *Hull*, with which she arrived at *Hull*, constituted two distinct voyages, and not within the exemption. *The Dock Company at Kingston-upon-Hull v. Huntington.* 597

SIGNATURE OF PLEAS.

See PLEADING, 21.

SIXTY SWORN CLERKS.

See BAIL, 7.

SLANDER.

See PLEADING, 41.

- "He has defrauded a mealman of a roan horse," are not actionable words, without special damage. *Richardson v. Allen*, in error. 657

SPECIAL CASE.

1. Rule nisi granted for the defendant to admit certain facts necessary to raise a question in a special case. *Huckle v. Hollis.* 398
2. Rule nisi granted for the *postea* to be handed over to the prosecutor, and for him to be at liberty to enter up judgment, defendant having neglected to settle the case reserved in *quo warranto*, for usurping office of mayor of *Ulchester*. *Rex v. Smith.* 398

SPECIAL JURY.

See COSTS, 9. JUDGMENT, 1. REG. GEN. 18.

SPIRITUOUS LIQUORS.

See REG. GEN. 4.

STAKE-HOLDER.

See MONEY HAD AND RECEIVED.

STAMPS.

See AFFIDAVIT, 1. ARBITRATION, 2. BAIL BOND, 1.

1. An appraisement does not require an award stamp, though in fact it is in the nature of an award. *Perkins v. Potts.* 399
2. A stamp is only necessary, where a paper is used in evidence of an agreement directly, and not where it is used incidentally; so it is evidence of an acknowledgment contained in it, though not stamped. *Wheldon v. Matthews and another.* Page 399

STATUTES (CONSTRUCTION OF).

See CONSTRUCTION. MANDAMUS, 3.

2 & 3 EDW. VI. c. 13.

See POSTEA.

5 & 6 EDW. VI. relating to Sale of Offices.

See OFFICE, SALE OF.

8 & 9 WILLIAM III. c. 11, s. 8.

See PLEADING, 8.

3 GEO. I. c. 15, s. 8.

See SHERIFF, 1.

2 GEO. II. c. 26, s. 4.

See CONVICTION, 6.

5 GEO. II. c. 30, s. 9.

See PLEADING, 27.

5 GEO. II. c. 30, s. 32.

See BANKRUPT, 2.

24 GEO. II. c. 14, s. 1.

See NOTICE OF ACTION.

4 GEO. III. c. 25.

See BILLS OF EXCHANGE, 11.

13 GEO. III. c. 84.

See TURNPIKE ACT.

27 GEO. III. c. 13.

See DRAWBACK.

27 GEO. III. c. 31.

See DRAWBACK.

33 GEO. III. c. 54.

See PLEADING, 23.

43 GEO. III. c. 46.

See COSTS, 2. BAIL, 1.

50 GEO. III. c. 49. s. 1.

See OVERSEERS, 1.

53 GEO. III. c. 102.

See INSOLVENT DEBTOR, 1.

53 GEO. III. c. 113, s. 6.

See TREASURER OF COUNTY.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STAYING PROCEEDINGS.

See BAIL, 67. COSTS, 1, 5, 6. INDICTMENT. MORTGAGOR AND MORTGAGEE. PLEADING, 3. TRIAL, 2.

STRIKING OUT PLEAS, &c.

1. On a motion to strike out the plea of the general issue, and file a plea, that the plaintiff was convicted of felony, the defendant must produce a certified copy of the record of conviction, and prove the identity of the party convicted. *Croker v. Siewright*. 400
2. Rule to produce the record may be given, although defendant has struck out rejoinder of *nil tiel* record. When a motion is opposed in first instance, no costs of opposition can be allowed, though notice of motion was given. *Gerard v. Gaskell*. 407
3. If a cause, where there is joinder on demurrer and no argument, be struck out of the paper, no one praying judgment, the cause must be entered *de novo*. *Anon.* 402

SUBMISSION.

See ARBITRATION, 1.

SUBPENA.

See EVIDENCE, 11.

When an officer of the court is served with

a *subpoena duces tecum*, to produce a judgment-book, if the personal attendance of the officer be necessary, he must be informed so, or the court will not grant an attachment against him, his clerk having attended with the book, though plaintiff was nonsuited in consequence. *Bennett v. Jones*. Page 403

SUNDAY.

See ERROR, 3.

SUPERFLUOUS COUNTS.

See PLEADING, 9.

SUPERSEDEAS.

See ERROR, 5. REG. GEN. 14, 20.

SURETY.

See BILLS OF EXCHANGE, 8. GUARANTEE. PLEADING, 35. INDEMNITY.

The consideration must be stated on the face of a guarantee. But notice of nonpayment by principal on demand on surety, seems necessary to be averred or proved. *Semb.* "credit," and "usual credit," are synonymous. Notice to produce, served at eight o'clock of evening before trial, too late. *Atkinson v. Carter*. 403

SURPRIZE.

See NEW TRIAL, 5, 13.

TAXATION.

See ATTORNEY, 1, 4. COSTS, 10, 16. EVIDENCE, 9.

TITHES.

See COSTS, 11. POSTEA. PROHIBITION.

Parol compositions for tithes are merely personal, and cease with the occupation of the tenant. The composition paid by the former occupier is *prima facie* evidence of value. *Payton, clerk, v. Kirkby*. 405

TOLL.

See TURNPIKE ACT.

1. An act of parliament, exempting carts, &c. loaded with manure, from tolls, exempts them from toll if they are going empty to fetch manure. *Harrison v. James*. 547
2. Under an exemption from toll in an act of parliament for carts carrying compost,

&c. or any thing whatsoever used in the manuring of land, the carriage of lime is not exempt. The words "or any thing whatsoever used in the manuring of land," were considered as only applying to the carriage of ploughs, harrows, and such like instruments. *King v. Gough.* 655

TOWER.

See ARREST, 23.

TRADE.

1. A bond by an apothecary, not to set up business within 20 miles, is not illegal, as in restraint of trade. *Hayward v. Young.* 407
2. An agreement between two coachmasters not to oppose each other, or charge higher prices, is legal. *Ilern v. Griffin.* 407

TRANSPORTATION.

See BAIL, 51.

TRAVERSE.

See PLEADING, 6.

TREASURER OF COUNTY.

A rule upon the treasurer of *Middlesex*, to pay over money to the treasurer of the county of *Surrey*, for the expense of relieving a prisoner in the King's Bench and Marshalsea prisons, on the 53 *Geo.* 3, c. 113, s. 6, refused, because a demand and refusal were not sworn to. *W. B. Mainwaring, Esq. Treasurer of County of Middlesex.* 409

TRESPASS.

See BAIL, 71. DECLARATION, 4. EVIDENCE, 6. INSOLVENT DEBTOR, 1. LIMITATIONS, STATUTE OF. PLEADING, 15, 19. PROCESS, 6.

1. The landlord of a tenant from year to year, though there is no reservation of the timber on the premises, may support trespass *vi et armis* against a third person, for carrying it away after it has been cut down. *Ward v. Andrews.* 636

MESNE PROFITS.

2. A joint action for mesne profits may be supported by several lessors of plaintiff in ejectment after recovery therein, although there were only separate demises by each. *Chamier and Plestow v. Llongon.* 410

TRIAL.

See ABATEMENT, 3. JUDGMENT, 1, 2. PLEADING, 2.

1. An affidavit, that a material witness is not likely to return till a day therein mentioned, impliedly swears that he is expected then. *Awon.* 411
2. The court will not put off the trial of a cause, brought by the assignees of a bankrupt, because a petition is pending against the commission of bankruptcy. *Assignees of — v. —.* 411

TRINITY HOUSE.

The Trinity House have a right to the duty of ballastage of skreened garden gravel, though not taken from the *Thames*. *Qu.* Whether gravel taken from the river *Lea* is within the jurisdiction of the Trinity House. *The Master, Wardens, and Assistants of the Guild Fraternity, or Brotherhood of the most Glorious and Undivided Trinity, and of St. Clement, in the Parish of Deptford Stroud, in the County of Kent, v. Staples.* 689

TROVER.

See PLEADING, 36, 38. DECLARATION, 4.

TRUSTEES.

See ARBITRATION, 2.

An act of parliament, authorizing trustees to improve public streets, and to sell waste lands, to defray the expences of such improvements, and to use the money arising from such sales in such manner as they shall think fit, for the carrying the purposes of the act into execution, does not authorize them to expend such money in the opposition of a bill in parliament, which, if passed, would turn out disadvantageous to the purposes of the former act. *Edwards v. Wilson.* 610

TURNPIKE ACT.

1. The exemption in the General Turnpike Act, 13 *Geo.* 3, c. 84, from payment of toll by a passenger crossing a road, and not going 100 yards thereon, is confined to carriages merely crossing the road. *Phillips v. Harper.* 412
2. A notice of action under an act of parliament against a tollgate-keeper, "for demanding and taking of me toll for and in respect of certain matters and things particularly mentioned and exempted from toll, in and by a certain act of parliament,

intituled," &c. is too uncertain, and bad.
Freeman v. Line. Page 673

UNDERTAKING.

A general undertaking by an attorney to appear to process, does not oblige him to put in bail to bailable process. *Anon.* 415

UNLIQUIDATED DAMAGES.

See *INSOLVENT DEBTOR*, 1.

USAGE.

See *EVIDENCE*, 4.

USE AND OCCUPATION.

See *PLEADING*, 11, 40.

VARIANCE.

See *DECLARATION*, 4. *PLEADING*, 31.

VENTIONI EXPONAS.

See *SHERIFF*, 2.

VENDOR AND PURCHASER.

See *SET-OFF*, 1. *WARRANTY*.

The vendor of a horse, who rescinds the contract, is liable to the purchaser for the keep of the horse during the time he kept it, from the day of the contract. *King v. Price.* 416

VENUE.

See *INDICTMENT*, 2.

1. *Venue* changed in action for assault, rule absolute in first instance. *Shepherd v. Hall.* 417

2. A motion to change the *venue* cannot be made by one of three defendants, without the consent of the other two, notwithstanding they had suffered judgment by default, and colluded with the plaintiff, as it was suggested, to withhold their consent. *Anon.* 417

3. The issuing of the writ is material evidence in an action for an escape, so as to enable the plaintiff to bring back the *venue* to *Middlesex*, on the usual undertaking; and therefore in such action the *venue* cannot be changed from *Middlesex* to *Northamptonshire* on a rule nisi. *Anon.* 418

4. Rule nisi granted to change *venue* from *London* to *York*, four witnesses living at *Leeds*, and only one of the facts occurring in *London*. *Anon.* 418

5. Rule nisi granted to change the *venue* from

York to *London*, the witnesses being *Greenland* fishermen, who would be absent at the time of the *York* assizes. *Atkinson v. Sadler.* Page 419

6. The court will refuse a rule to change the *venue* in an action on a breach of covenant, though there was a view prayed; because no preponderating circumstances were shewn to make the changing of the *venue* necessary. *Anon.* 419

7. A penal action for non-residence must be brought in the county in which the living is situated. *Whitehead v. Wynne.* 420

VIEW.

The court will only under particular circumstances grant a view in an indictment for perjury; but a view will be refused, if there be any risk of its misleading the jury. *Anon.* 422

VERDICT.

See *EJECTMENT*, 1.

VESTRY-BOOK.

See *MANDANUS*, 8.

WAIVER.

See *WARRANT OF ATTORNEY*, 1.

WARRANT OF ATTORNEY.

See *BARON AND FEME.* REG. GEN. 24.

1. A subsequent assignment of goods for the sum secured by a warrant of attorney, is not a waiver of the warrant of attorney. *Anon.* 423

2. Where the plaintiff brought an action upon an annuity deed, and afterwards took a warrant of attorney for the sum due, with a provision, that if within a certain time the annuity was not paid, he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the nonpayment of the annuity; held, that he was not at liberty under this clause, to take out execution for the costs of the action. *Delane v. Mott.* 423

WARRANTY.

A cough, unless proved to be of quite a temporary nature, is an unsoundness; and a verdict for the defendant was held wrong, though the horse had the next day after the warranty, been rode a hunting. When it is through the error of the jury, a new trial is granted on payment of costs; but it is otherwise when through their

